(20,477.)

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1907.**

## No. 163.

STILSON HUTCHINS, WILLIAM J. DANTE, AND BEN B. BRADFORD, APPELLANTS,

*vs.*

CARRIE L. MUNN.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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# In the Court of Appeals of the District of Columbia.

No. 1680.

STILSON HUTCHINS ET AL., Appellants,
*vs.*
CARRIE L. MUNN.

a Supreme Court of the District of Columbia.

No. 23468. Equity.

STILSON HUTCHINS, Complainant,
*vs.*
CHARLES A. MUNN, CARRIE L. MUNN, JAMES G. HILL, WILLIAM P. LIPSCOMB, Defendants.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington in said District, at the times hereinafter mentioned, the following papers were filed, and proceedings had, in the above-entitled cause, to-wit:

1 *Bill.*

Filed August 14, 1902.

In the Supreme Court of the District of Columbia, Holding a Court in Equity.

No. 23468. Equity.

STILSON HUTCHINS, Complainant,
*vs.*
CHARLES A. MUNN, CARRIE L. MUNN, JAMES G. HILL, WILLIAM P. LIPSCOMB, Defendants.

The complainant respectfully states:

1. That he is a citizen of the United States and a resident of the City of Washington, District of Columbia, and brings this suit in his own right.

2. That the defendants are citizens of the United States and residents of the District of Columbia; the defendants Charles A. Munn

and Carrie L. Munn, are sued in their own right, and the defendant James G. Hill as the architect, and William P. Lipscomb as the builder of the addition hereinafter referred to, and are sued in that capacity.

3. That on or about the month of August, 1882, the complainant became possessed of and was seized in fee simple of the following described property: Lots Sub No. 142 and part of Sub Lot No. 4 in Square No. 181 in the City of Washington, and District of Columbia, together with all and *and* singular the ways, passages,
2 easements, rents, issues, profits and appurtenances thereunto belonging, and still continues to possess the same.

4. That subsequent to the purchase of said property and about twenty years since, the complainant at great cost erected thereon a dwelling pursuant to a permit issued by the building inspector of the District of Columbia and upon the faith and in accordance with the building regulations as prescribed by the Commissioners of the said District, and for the purpose of obtaining the necessary light and ventilation said dwelling was made to conform to the plan and design of the house located on the lot adjoining, now owned by Carrie L. Munn, the wife of the defendant Charles A. Munn, more particularly referred to in paragraph 7 of this bill; that prior to the erection of said dwelling by your complainant it was expressly understood and agreed between your complainant and William W. Windom, the then owner of Sub-lot No. 141, in Square No. 181, hereinafter referred to, that the area or space for which a permit has now been issued and upon which the defendants are now building the addition hereinafter referred to should be forever kept free and clear from all buildings, additions, structures or coverings of any kind or character in order that the necessary light and ventilation might be preserved to the premises of your complainant, and said Windom.

5. That such dwelling was and is still known as No. 1603 Massachusetts Avenue, Northwest, Washington, District of Columbia, and consists of the lots above described in par. 3, and a building three stories and basement in height, occupied and used as a dwelling by the complainant.

3 6. That the complainant is the owner of said lots and premises and also of the ground included in the bed of said street adjoining and abutting on the said lot to the center line of such street, subject only to the public easements hereinafter mentioned and as such owner of such premises, this complainant acquired a free and unobstructed right of way, access and passage to and from said lot and premises over and upon the said street and all parts thereof, together with all the use of the light and air coming in and upon said lot and premises and building, and the right to have doors and windows opening upon the said street and the light and air therefrom free and unobstructed with the right to use said street free from obstruction.

7. That the defendant Carrie L. Munn claims to own and is in possession of lot Sub No. 141, in Square 181, in the City of Washington, District of Columbia, said lot being a parallelogram in shape,

having a frontage of 60.92 feet or thereabouts on Massachusetts Avenue, Northwest and a depth of 66 feet more or less, being numbered 1601 Massachusetts Avenue, Northwest, and adjoins on the east the property of the complainant which is more particularly referred to in paragraph 3 of this bill.

8. That a portion of said lot of said Carrie L. Munn has been improved by a three story and basement brick dwelling house, a portion of the outer lines of which are indicated in Exhibit No. 1 hereto annexed.

9. That the defendant Charles A. Munn is residing at No. 1601 Massachusetts Avenue, Northwest, and is the husband of
4 Carrie L. Munn who claims to own and is in possession of the property referred to in paragraph 7 of this bill, and that he is the party in whose name the permit was issued on the 29th day of July, 1902, to build the brick addition hereinafter referred to; that the defendant James G. Hill is the architect in charge of the erection of the addition hereinafter referred to and that William P. Lipscomb is the builder at present engaged with his employees and agents in the erection of the addition to said building all of whom are proceeding in the erection of said addition without authority of law.

10. That on or about the 10th day of July, 1902, the defendant Carrie L. Munn without authority of law commenced the building of the foundation walls of a new brick addition to her said house, said walls being along the east side of the lots hereinbefore referred to of your complainant.

That said defendant Carrie L. Munn has since said date by her servants, agents and employees partially erected and is still engaged in building a superstructure upon said foundation walls which have about reached the level of the ground, the intention of said defendant Carrie L. Munn being, as complainant is informed and believes, to carry said superstructure to the height of three full stories, besides a basement story partly above the ground.

11. That the erection of such addition will operate to deprive the complainant of the light and air to which he is entitled under the law as owner of the premises hereinbefore referred to, and which he has enjoyed for the past twenty years or there-
5 about, since said proposed addition will substantially destroy all light and ventilation to the pantry in the dwelling of your complainant as well as partially closing the window in his dining room and the windows in the two rooms in the second and third stories of his said dwelling, on the east side thereof and in many other respects operate to injure his property aforesaid, as well as result in a grievous nuisance to your complainant.

12. It is furthermore averred that the erection of such addition is without a proper permit in that it was issued to one "C. A. Munn" who is not the owner of the property described in paragraph 7 of this bill, and that notwithstanding such fact, even if a permit had been issued to the proper party the erection of such addition is contrary to the provisions of the building regulations provided by the Commissioners of the District of Columbia to govern the erection and maintenance of buildings in the said District.

13. That complainant is informed and believes, and believing he avers, that in the erection of said addition the said Charles A. Munn is acting under the pretended authority of H. B. Davis, as acting Inspector of Buildings, as contained in a certain "permit," so-called, issued by the said H. B. Davis as acting Inspector as aforesaid, a copy of which said so-called "permit" is herewith filed marked "Exhibit No. 2," and made part hereof, which said so-called "permit" is dated July 29, 1902, and was issued to said "C. A. Munn" or his agent in pursuance of an application therefor. That complainant has requested the Inspector of Buildings as well as the District Commissioners to cancel or recall said permit but they declined so to do.

Your complainant further states that he has been informed
6 and believes that some time prior to the granting of said last mentioned so-called "Permit" an application for a permit for a like purpose was filed by said Charles A. Munn or in his behalf, but for reasons unknown to your complainant the same was rejected.

14. The complainant further avers that on the 1st day of March, 1902, the Commissioners of the District of Columbia issued certain regulations governing the erection, removal, repair, and maintenance of buildings in the District of Columbia pursuant to the Act of Congress approved June 14, 1878; that Section 33 of said regulation provides as follows:

"To secure proper light and ventilation, dwellings, hotels, apartment or tenement houses, or buildings erected for and used or to be used as such shall be so located and erected on their respective premises as to provide for and preserve at least ten per centum of the area of the lot, plot, and premises free from all construction from ground to sky; but furthermore, in no event, except on corner lots at intersection of two streets, shall said reserved space or area be so arranged or disposed as to permit the building or buildings aforesaid to be located or erected within ten feet of the rear line of the lot, plot, or premises on which the building stands or is to stand, but the last restriction may not be applied when the rear of the lot abuts on a public alley at least ten feet in width, a street or other public space or where the side abuts for the full depth of the lot upon a public alley at least ten feet wide, or where there is preserved a side yard or space extending the full depth of the building and of an area of at least 10 per centum of the area of the whole lot, plot, and premises on which the building is erected or to be erected; but in no event shall such side yard be of less area than 250 square feet. Any corner lot adjacent for its full depth to a street or avenue may be built upon for its full depth, provided at least 10 per centum of the area of such lot be reserved and arranged for light and ventilation in a manner approved by the Inspector of Buildings. Angular corner lots abutting lots that extend from street to street may be excluded from the above restrictions. Buildings on busi-
ness streets may cover the entire area of a lot for such of
7 the stories beginning with the lower as are used for store or salesroom purposes only. Fire escapes shall be located so

as not to encroach on any public alley less than 15 feet wide when such alley only is relied upon and used for ventilation and light, as provided for in this section; and, furthermore, no buildings mentioned in this section now or hereafter erected shall be altered or enlarged to *encroach upon space reserved for light and ventilation, either on the same or on adjoining premises.*"

The said section of said regulations was amended on the 29th day of May, 1902, so as to exclude the words "angular lots, abutting lots that extend from street to street may be excluded from the above restrictions," and there was inserted in lieu thereof the following: "Acute angle corner lots abutting lots that extend from street to street, or from a street to a public alley at least 10 feet wide or when sufficient facilities for light and ventilation are provided to the satisfaction of the Commissioners, may be excluded from the above restrictions."

That said amendment was amended on the 8th day of July, 1902, by striking out therefrom the words "acute angle."

Your complainant avers that the so-called permit issued to said defendant Charles A. Munn is contrary to said building regulations and any amendment thereof, and is totally insufficient and inoperative in law to authorize the erection by the defendant Charles A. Munn or Carrie L. Munn his wife of the said addition, but on the contrary, in so far as the same pretends to authorize the erection of said addition is utterly null, void, and of no effect, in that it fails to preserve at least 10 per centum of the lot, plot and premises free from all construction from ground to sky and furthermore encroaches upon the space reserved for light and ventilation
8 for the premises of your complainant.

15. Your complainant further avers that the erection of the addition contemplated by the defendants Charles A. Munn or Carrie L. Munn, would involve an invasion of the complainant's right of property by shutting out the light and air from his said dwelling which right he has enjoyed for the past twenty years or thereabouts and would constitute a grievous nuisance to complainant, and in consequence would result in great damage and injury to his property.

Wherefore being without remedy at law your complainant prays.

First: That a writ of subpœna may issue out of and under the seal of this honorable Court directed to the said defendants Charles A. Munn, Carrie L. Munn, James G. Hill and William P. Lipscomb, whom your complainant prays may be made defendants hereto commanding them to appear and answer the exigencies of this suit, their answers under oath being hereby expressly waived.

Second: That the defendants Charles A. Munn, Carrie L. Munn, James G. Hill and William P. Lipscomb, their agents, servants and employees be perpetually enjoined and restrained from further proceeding with the erection of said addition in the 10th paragraph of this bill described, and further that the defendant Carrie L. Munn be enjoined and required to remove the said structure so far as the same is already built and so far as the same deprives the dwelling of the complainant of light and air and to restore such part of

the land now occupied by the partially built walls of said addition so far as it interferes with the light and air of said premises,
9 of your complainant to the same condition in which it was before the commencement of the erection of said addition and that each of said defendants be enjoined and restrained during the pendency of this suit from further proceeding with the erection of the addition in the 10th paragraph of this bill described.

Third: And for such other and further relief as the nature and circumstances of the case may require and to this honorable Court shall seem proper.

STILSON HUTCHINS.

BRANDENBURG & BRANDENBURG,
*Solicitors for Complainant.*

DISTRICT OF COLUMBIA, *ss:*

Stilson Hutchins upon oath says that he has read the foregoing petition by him subscribed; that the facts therein stated upon his personal knowledge are true and those stated upon information and belief he believes to be true.

STILSON HUTCHINS.

Subscribed and sworn to before me this 13th day of August, A. D. 1902.

[SEAL.]

H. J. SWEENEY,
*Notary Public, D. C.*

10 *Restraining Order.*

Filed August 14, 1902.

In the Supreme Court of the District of Columbia, Holding a Court in Equity.

No. 23468. Equity.

STILSON HUTCHINS, Complainant,
*vs.*
CHARLES A. MUNN, CARRIE L. MUNN, JAMES G. HILL, WILLIAM P. LIPSCOMB, Defendants.

On reading and filing the bill of complaint of Stilson Hutchins, complainant, in this cause, and upon motion of Brandenburg and Brandenburg, Esquires, solicitors for complainant, it is ordered this 14 day of August, 1902, that the defendants and each of them show cause before this Court upon the 4" day of September, A. D. 1902 at the opening of court, why the prayer of said bill, asking for a permanent injunction be not granted, with the option to apply at an earlier date for hearing upon proper notice to counsel for complainant.

It is further ordered that until the hearing upon said order to show cause, the defendants and each of them, be restrained and enjoined from continuing the erection of the addition to the dwelling specifically referred to in paragraphs seven and ten of the bill of complaint.

By the Court:

HARRY M. CLABAUGH,
*Associate Justice.*

11 *Injunction Undertaking.*

Filed August 14, 1902.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

No. 23468, Equity Docket.

STILSON HUTCHINS, Complainant,

—

CHARLES A. MUNN ET AL., Defendants.

Stilson Hutchins, the Complainant, and William J. Dante, Ben B. Bradford, sureties, hereby undertake to make good to the defendant all damages by *him* suffered or sustained by reason of wrongfully and inequitably suing out the injunction in the above-entitled cause, and stipulate that the damages may be ascertained in such manner as the justice shall direct, and that, on dissolving the injunction, he may give judgment thereon against the principal and sureties for said damages in the decree itself dissolving the injunction.

STILSON HUTCHINS.
WILLIAM J. DANTE.
BEN B. BRADFORD.

Witness:
E. C. BRANDENBURG.

Approved: August 14th, 1902.
HARRY M. CLABAUGH, *Justice.*

12 *Motion to Discharge Rule to Show Cause and to Dissolve, &c.*

Filed August 27, 1902.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 23468.

STILSON HUTCHINS, Plaintiff,
*v.*
CHARLES A. MUNN and Others, Defendants.

Now come here the defendants by their attorneys, Messrs. Samuel Maddox and H. Prescott Gatley, and move the court to discharge

the rule to show cause and to dissolve the preliminary restraining order or injunction heretofore granted in the above entitled cause.

SAM'L MADDOX,
H. PRESCOTT GATLEY,
*Attorneys for Defendants.*

Messrs. Brandenburg & Brandenburg, Attorneys for Plaintiff:

Please take notice that on Thursday, August 21, 1902, at ten o'clock A. M., or as soon thereafter as counsel can be heard, we will call the attention of Mr. Justice Clabaugh, holding the Equity Court, to the foregoing motion, and ask for an order in accordance therewith.

SAM'L MADDOX,
H. PRESCOTT GATLEY,
*Attorneys for Defendants.*

Service of above motion acknowledged this 17th day of
13 August, 1902.

BRANDENBURG & BRANDENBURG.
W. D. WAUGH.

*Joint and Several Answer of Defendants Charles A. Munn, &c., October 30, 1902.*

In the Supreme Court of the District of Columbia.

Equity. No. 23468.

STILSON HUTCHINS, Complainant,
*vs.*
CHARLES A. MUNN and CARRIE L. MUNN, Defendants.

The joint and several answer of defendants Charles A. Munn and Carrie L. Munn to the bill of complaint exhibited in this cause against them and others by Stilson Hutchins.

These defendants now and at all times hereafter, saving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and insufficiencies in the bill of complaint herein contained, for answer to the rule to show cause issued thereon and to the said bill, or to so much thereof as they are advised it is material or necessary for them to make answer to, answering say:

1. They admit to be true the averments of paragraph one of the bill.

2. They admit to be true, as averred in paragraph 2 of the bill, that the defendants are all citizens of the United States, commorant in the District of Columbia, and these defendants show that they are husband and wife and for many years last past have made their
14 home in house and premises known as No. 1601 Massachusetts Avenue, Northwest, in the City of Washington, District of Columbia. But these defendants submit that it is

nowhere averred or shown either in said paragraph 2, or in any other part of said bill, why they should be interpleaded with defendants Hill and Lipscomb in respect of any matter or thing complained of in said bill.

3. These defendants know nothing of their own knowledge of the averments of paragraph 3 of the bill and in so far as the same can or may affect the rights of these defendants *defendants* in the premises they call for strict proof thereof.

4. Answering paragraph 4 of the bill, these defendants say that they do not know of their own knowledge when the complainant bought the property he claims to own or whether or not the house thereon erected by him was built in pursuance of a permit from the Inspector of Buildings and in conformity with the building regulations then in force in said District. But these defendants show that the east wall of complainant's house is a party wall and that said wall encroaches two and one-half inches over the lot of defendant Carrie L. Munn in excess of what is allowed by law; that said wall is solid and without openings of any kind to a height of two stories and for a distance of, to-wit, 28 feet measured on a line running due south from the northeast corner of complainant's lot; at the south end of this solid wall there is a recess pantry window in complainant's house set back some distance from the division line between the two lots, but evidently so constructed in order that light and air might get into said window in the event that the lot adjoining on the east was ever built upon, but protruding beyond this line at a point distant twenty (20) feet north of the building line on Massachusetts Avenue, more than eleven (11) inches. To the extent herein shown the complainant unlawfully and without right is trespassing upon the lands of defendant Carrie L. Munn and should and ought to be required to remove his said wall from her said lands.

Further answering said paragraph, these defendants say that they do not know what, if any agreement, was made by the complainant, at the time he erected his said house, with William Windom, a former owner of the lot now owned by defendant Carrie L. Munn, with regard to buildings of any sort thereafter to be erected on the portion of said lot upon which said defendant is now desirous of erecting an addition to her dwelling house. And these defendants are advised that even if there was such an agreement, which they do not believe, the same is not binding upon these defendants, or either of them, and for the reason that they had no notice or knowledge, prior to the filing of the bill in this cause, thereof, and the said lot was conveyed to defendant Carrie L. Munn by said William Windom in fee simple absolute as will appear by reference had to a copy of the deed heretofore filed in this cause, marked "Defendants' Exhibit H. & L., No. 2," through and by which deed, the defendant Carrie L. Munn acquired title to her said lot. And these defendants are advised that said alleged agreement can in no sense be binding upon them or either of them for the further reasons that it does not appear that it was reduced to writing or that any con-

sideration therefor moved from the complainant to the said William Windom.

16 To the contrary of any such agreement defendant Charles A. Munn says that at the time of the purchase of said lot 141, and during all negotiations connected therewith, he acted for his wife, defendant Carrie L. Munn, and carefully examined the building erected on said lot and the vacant grounds appurtenant to said building in company with said William Windom, then in life and the owner thereof, but since deceased. Defendant Charles A. Munn then noticed the hereinbefore referred to recess window in the east wall of complainant's house, and also three or four windows in the south wall of the house next adjoining said lot 141 (also erected, as these defendants are informed, by complainant), on the north, all of which overlooked said lot. Calling attention to each and all of these windows, said defendant inquired of said Windom if the lot he was then desirous of selling and afterwards sold to defendant Carrie L. Munn, was in any way obligated to furnish light and air to the adjoining property through said windows, or any of them. In reply to this inquiry said Windom told defendant Charles A. Munn, most positively, that there was no obligation or agreement of any kind resting upon or encumbering said lot 141 which would prevent building upon the entire lot if a purchaser from him, said Windom, so desired. Had there been any restriction upon said lot 141 because of windows looking over it from the houses next adjoining on the west and north, these defendants would not have bought said lot or certainly would not have paid the price they did for it. The freedom of said lot from any and all building restrictions entered into and formed a material part of the consideration for its purchase.

17 Wherefore, and for the reason that the said William Windom, as was well-known to defendant Charles A. Munn, was an upright and honorable man, who had attained high perferments both in his State and in the United States, these defendants say that it is not true that he ever entered into such an agreement as that set up and pretended in said paragraph 4 of the bill.

5. These defendants admit to be true the averments of paragraph 5 of the bill.

6. These defendants are advised that the averments of paragraph 6 of the bill, except in so far as they reiterate the allegation previously made in the bill that complainant owns the house next adjoining on the west of the house of these defendants, states conclusions of law which these defendants are not required to answer. But these defendants are informed that the Supreme Court of the United States has held that the complainant has no other or greater rights in the street on which his house was built than any other individual member of the public, and that without the consent of the United States said street is subject to no private use whatever.

7. Answering paragraph 7 of the bill, these defendants say that defendant Carrie L. Munn does not pretend to own, but does in fact own, said lot No. 141 in fee simple absolute, which said lot is described with substantial accuracy in said paragraph.

8. Answering paragraph 8 of the bill, these defendants admit that part of said lot 141 is improved by a three-story and basement brick dwelling house, amply provided with windows for all needed
18 requirements of light and ventilation. Further answering said paragraph these defendants show that other portions of said lot are improved with two one-story structures, with adjustable glass sky-lights which afford ample light and ventilation for the purposes for which said structures were erected, viz., for a billiard room and a conservatory.

9. Answering paragraph 9 of the bill, these defendants admit that defendant Charles A. Munn resides with his family at house numbered 1601 Massachusetts Avenue, built upon said lot, and that defendant Carrie L. Munn is his wife. Further answering said paragraph these defendants aver and show that after they had determined upon the style and arrangement of a proposed addition to said house, defendant James G. Hill was employed to prepare plans and specifications for said addition and have said addition erected in accordance therewith. Full authority was given by these defendants to the said defendant Hill to procure necessary permits from the District authorities and enter into all necessary contracts for doing the proposed work, said defendant Hill well knowing that the said lot 141 belonged to defendant Carrie L. Munn. After these preliminaries had thus been arranged, and before a permit to build said proposed addition had been applied for, so far as these defendants knew at the time, these defendants went to Europe, leaving said defendant Hill in charge of the proposed work, with full power and authority from defendant Carrie L. Munn to provide all the material and employ all the labor necessary for erecting the proposed addition and making other changes in said house No. 1601 Massachusetts
19 avenue.

And these defendants aver and show that each and everything done by said defendant Hill in the premises, and by defendant Lipscomb in and about the said work, is in strict accordance with the building regulations in force in the District of Columbia and the permits in that behalf granted by the Inspector of Buildings.

10. Answering paragraph 10 these defendants say that for reasons hereinbefore set forth, to wit, their absence in Europe, they do not know when defendant Lipscomb commenced building said foundation walls, or to what extent said work had proceeded when the bill in this cause was filed. But these defendants admit that it was their purpose to carry said proposed addition to the full height of three full stories on the portion of said lot fronting on Massachusetts Avenue, with a width of 12 feet 6 inches, by a depth of 32 feet, and they were very anxious to have the necessary work done during the summer months so that said house might be ready for occupancy by or before the middle of November, as could readily have been accomplished but for the restraining order herein.

11. Answering paragraph 11 of the bill, these defendants say that it is not true that the erection of the proposed addition to their said home will deprive the complainant of light and air to which he is entitled under the law as owner of lands next adjoining on the

west, and they further say that it is not true that complainant has acquired by prescription or otherwise any right to light and air over and across said lot 141, the property of defendant Carrie L. Munn. Further answering said paragraph, these defendants say that when the complainant erected his said house 1603 Massa-
20 chusetts Avenue, he built a party wall along the east line thereof, and intentionally, as these defendants believe, caused the same to be extended a greater distance over said lot 141 then he was by law entitled to do; and that when defendant Carrie L. Munn built the one-story structures hereinbefore referred to the complainant exacted from her, and she paid to him, the full compensation provided by the laws in force in the District of Columbia for the use of party walls.

12. Answering paragraph 12, these defendants say that, as hereinbefore shown, after they had determined upon style and character of desired changes in their home, all further details connected with the work were intrusted to defendant Hill, and they are informed that a permit to build was applied for by defendant Lipscomb, the contractor employed by defendant Hill to do said work. And if said Lipscomb applied for a permit in the name of "C. A. Munn," and a permit in that name was issued, it was a mere clerical error from which the complainant ought not to receive any benefit or advantage, and about which he ought not, in equity, be heard to complain.

Further answering said paragraph, these defendants say, as hereinbefore set forth and shown, that all steps taken by them and their co-defendants Hill and Lipscomb, in and about the said proposed work, have been and were intended to be in strict accordance with the laws and building regulations in force in the District of Columbia.

13. Answering paragraph 13, these defendants say that they are informed and believe, and so believing aver and show that
21 the permit to build, issued as before shown on the application of defendant Lipscomb, was regularly and properly issued by one H. B. Davis, as acting inspector of buildings during the absence of his superior officer, under and by virtue of authority vested in him by said building regulations. Further answering said paragraph, these defendants show, as appears in the concluding sentence of the first clause of said paragraph, that the matter of said permit was brought to the attention of the District *of* Commissioners by the complainant, with the request that the same be cancelled and revoked, which request the said Commissioners declined, thereby confirming the act of their subordinate, the said H. B. Davis, in the premises. And these defendants are advised that the action so had and taken by the District of Columbia Commissioners and their subordinates in office in respect of said permit is final and conclusive, and cannot be questioned by the complainant in this proceeding.

14. Answering so much of paragraph 14 as refers to the promulgation of building regulations for the City of Washington by the District Commissioners, and the several quotations and references to said regulations and amendments thereto from time to time duly and properly made, these defendants admit that the same are set

forth with substantial accuracy in said paragraph, but for greater certainty refer to the published volumes containing said regulations and the records of the District Commissioners' office showing amendments thereto since made, copies of which latter in so far as the same affect in any way the proposed addition to defendants' said
22 dwelling are herewith filed marked "Defendants' Exhibit H. & L. 4," which it is prayed may be referred to at the hearing of this cause and taken and considered a part hereof.

Further answering said paragraph, these defendants say that they are advised that the District Commissioners have ample power and authority of law to make and enforce building regulations for the said District and modify the same from time to time as they may think the public interests require; and that the said amendments so as aforesaid made and contained in Defendants' Exhibit No. 4, are in all respects reasonable and cannot be questioned by the complainant in this proceeding.

Further answering said paragraph, these defendants here again deny that the erection of said proposed addition is contrary to law or to said building regulations or contravenes any right the complainant may or can have in the premises.

Further answering said paragraph, these defendants show that their said dwelling house is built upon a corner lot, fronting on the south on Massachusetts Avenue, a public highway 160 feet in width, and on what is known as "Scott Circle," a large open public park, and on the east on 16th Street, a public highway also 160 feet in width; that said dwelling house is provided with windows and skylights amply sufficient for all purposes of light, air and ventilation, and by reason of its location and surroundings and plan of construction is in all respects in a sanitary condition and contains, generally, all the latest improvements in the house builders' art designed to make homes attractive, comfortable and elegant.

23 15. Answering paragraph 15 of the bill, these defendants here again deny that the erection of said proposed addition to their said dwelling-house involves any, even the slightest, invasion of complainant's right of property in his said lot next adjoining on the west, or that he has any right to light and air over and across the lot of defendant Carrie L. Munn, and they further deny that complainant has enjoyed such a right for a period of twenty years, or ever lawfully acquired such a right by prescription or otherwise. And these defendants further deny that said proposed addition will in any sense be or constitute a nuisance, it being the purpose of these defendants to build said addition of the material best suited to such work and in a style consistent with and conforming to their present dwelling house, which is and is considered one of the finest private residences in the City of Washington.

Further answering said paragraph, these defendants show that in erecting said addition it is their purpose to continue to within 18 inches of the Massachusetts Avenue front of said lot 141 the party wall heretofore constructed by complainant along the division line at the north end of his lot, and that it would be most inequitable to prevent her from so doing, thereby confiscating for the benefit of

the complainant a valuable piece of property and rendering the same practically useless to her or to any other person than the complainant in this cause.

And these defendants further set forth and show that the restraining order issued in this cause during their absence in Europe, and while defendant Charles A. Munn was at Carlsbad for the
24 benefit of his health, was and is a grievous inconvenience to them and a great injury. Said restraining order has delayed the prosecution of said work since the 14th of August, 1902, and will prevent the defendant Lipscomb from completing the work in time to make the house available during the coming season either for occupancy by these defendants or to rent in the event they conclude to spend the forthcoming winter in Europe.

And these defendants submit to this Honorable Court that all and every the matters in said complainant's bill mentioned and complained of are matters which may be tried and determined at law and with respect to which the said complainant is not entitled to any relief from a Court of Equity, and these defendants hope they shall receive the same benefit of this defense as if they had demurred to the said complainant's bill.

Wherefore, defendants pray that said restraining order be forthwith discharged.

And having fully answered said bill or so much thereof as they are advised it is necessary or material for them to make answer unto, these defendants pray to be hence dismissed with their reasonable costs in this behalf most wrongfully and inequitably sustained.

And defendants will ever pray, &c.

CHARLES A. MUNN.
CARRIE L. MUNN,
By CHARLES A. MUNN,
*Her Attorney in Fact.*

SAM MADDOX,
*Solicitors for Defendants.*

25 STATE OF NEW YORK,
*City of New York, County of New York, ss:*

Before me, the undersigned, personally appeared Charles A. Munn, who, being first duly sworn according to law, deposes and says:

I have read over the foregoing answer by me subscribed and know the contents thereof; the matters and things therein stated as of my own knowledge are true and the matters and things therein stated on information and belief I believe to be true. I further say that in all matters pertaining to the purchase of house No. 1601 Massachusetts Avenue and in the matter of remodellings and changes therein since made from time to time, I acted as the business agent of my wife Carrie L. Munn. With her approval and consent I employed James G. Hill an architect of large experience to prepare plans for the proposed addition to her said house, and authorized him to contract in her name for the erection thereof. She sailed for Europe on or about the 8th day of May, 1902, and I followed on

the 6th day of June, next succeeding, leaving said Hill in charge of the proposed work. We were both in Europe when the bill in this cause was filed and when we learned that the presence in Washington of one or the other of us was necessary, I immediately came back, leaving her in Dresden, where she still is. And I was fully authorized by her to employ counsel in her behalf and do whatever else was necessary in her place and stead, to secure a dissolution of the restraining order issued in this cause and procure the
26 speediest possible completion of the work.

CHARLES A. MUNN.

Subscribed and sworn to before me this 8th day of October, A. D. 1902.

[SEAL.] SELAH L. BENNETT,
*Notary Public, Westchester Co.*

Ctf. filed in New York Co.

27 "DEFENDANTS' EXHIBIT H. & L. 4."

Filed October 30, 1902.

Executive Office, Commissioners of the District of Columbia.

WASHINGTON, *May* 28, 1902.

Ordered: That section 33 of the building regulations, relative to light and ventilation is hereby amended by excluding the sentence "angular lots abutting lots that extend from street to street may be excluded from the above restrictions," and inserting in lieu thereof the following:

("Acute-angle) corner lots abutting lots that extend from street to street, or from a street to a public alley at least ten feet wide, or where sufficient light and ventilation are provided to the satisfaction of the Commissioners, may be excluded from the above restrictions."

Official copy furnished
By order:

WILLIAM TINDALL,
*Secretary Board of Commissioners, D. C.*

28 Executive Office, Commissioners of the District of Columbia.

WASHINGTON, *July* 7, '02.

Ordered: That the order of May 28, 1902, amending section 33 of the building regulations relative to lighting and ventilation, is hereby amended by striking out the words "acute angle."

Official copy furnished
By order:

WILLIAM TINDALL,
*Secretary Board of Commissioners, D. C.*

29 *Motion of Defendants Munn for Discharge of Restraining Order and Order of Justice Anderson Certifying Cause, &c.*

Filed October 30, 1902.

In the Supreme Court of the District of Columbia.

In Equity. No. 23468.

STILSON HUTCHINS
*vs.*
CHARLES A. MUNN and Others.

To Hon. Thos. H. Anderson, Associate Justice, Supreme Court of the District of Columbia:

The defendants Charles A. Munn and Carrie L. Munn, having filed their answer to the bill of complaint exhibited in this cause against them, humbly beg and pray that the restraining order passed herein on the 14th day of August, 1902, be forthwith discharged.

And these defendants will ever pray, &c.

CHARLES A. MUNN,
CARRIE L. MUNN,
By SAM'L MADDOX,
*Their Att'y.*

This motion is respectfully referred to Mr. Justice
30 Hagner.

T. H. ANDERSON,
*Asso. Justice.*

October 30/02.

*Order Vacating Decree of November* 21, 1902, *&c.*

Filed November 25, 1902.

In the Supreme Court of the District of Columbia.

In Equity. No. 23468.

STILSON HUTCHINS
*v.*
CHARLES A. MUNN and Others.

It appearing to the Court that the order passed herein on the 21st day of November, A. D., 1902 did not express the judgment of the Court upon the case as presented and decided, in that said decree prematurely referred the cause to the Auditor to ascertain and report upon the question of damages, if any, resulting to the defendants by reason of the wrongful suing out of the temporary injunction:

It is therefore this 25th day of November, A. D., 1902 ordered that said order as so passed be and the same is hereby vacated and for nothing held, and the following substituted in its place and stead:

This cause coming on to be heard on the motion of the defendants to dissolve the temporary injunction and discharge the rule to show cause heretofore granted herein, the bill of complaint and the
31 answers of the defendants thereto, the exhibits to said bill and answers, and all other the proceedings were read and considered, and after argument by counsel for the respective parties, the same was submitted to the court.

It is thereupon this 25th day of November, 1902, after due consideration thereof, by this court, and the authority thereof, adjudged and ordered that the temporary injunction heretofore granted herein on the 14th day of August, A. D., 1902, be, and the same is hereby, dissolved, and the rule to show cause issued herein on the same day be, and the same is hereby discharged.

By the Court:

A. B. HAGNER, *Justice.*

*Order of Reference to Auditor.*

Filed May 28, 1903.

In the Supreme Court of the District of Columbia.

Equity. No. 23468.

STILSON HUTCHINS, Complainant,
*vs.*
CHARLES A. MUNN ET AL., Defendants.

It appearing to the Court that the mandate of the Court of Appeals affirming the decree of this court passed November 25, 1902, dissolving the injunction and discharging the rule to show cause theretofore granted herein, was filed in this cause on the 23rd day of May, 1903,

It is, this 28th day of May, A. D., 1903, upon motion of the defendants, by their solicitors, adjudged, ordered and decreed
32 that this cause be and the same is hereby referred to the Auditor of this Court to ascertain and report the damages, if any, suffered or sustained by the defendants, or any of them, by reason of the wrongfully and inequitably suing out of the said injunction.

By the Court:

A. B. HAGNER,
*Asso. Justice.*

*First Report of Auditor.*

Filed February 18, 1905.

In the Supreme Court of the District of Columbia.

Equity. No. 23468.

STILSON HUTCHINS
*vs.*
CHARLES A. MUNN ET AL.

This cause is referred to me to ascertain and report the damages, if any, suffered or sustained by the defendants or any of them by reason of the wrongful and inequitable suing out of the injunction of August 14, 1902. After due notice I proceeded with the reference.

At the time of filing the original bill in this cause and for several years prior thereto, the defendant Carrie L. Munn was the owner of the house and premises described as 1601 Massachusetts Avenue being located at the corner of 16th street northwest and fronting on said avenue. With a view to improving the house she had employed the defendant James G. Hill as architect and the defendant William P. Lipscomb as builder, for the construction of a three story brick addition to the house on the west side.

33 This work was commenced about the first of July 1902 and progressed until the 14th of August. On that date the complainant in this cause filed his original bill setting forth in the seventh paragraph thereof "that the defendant Carrie L. Munn claimed to own and be in possession of sublot No. 141 in square 181, said lot being a parallelogram in shape, having a frontage of 60.92 feet on Massachusetts Avenue northwest and a depth of 66 feet more or less being numbered 1601 Massachusetts Avenue northwest and adjoining on the east and property of the complainant;" and in paragraph ten asserting "that on or about the 10th day of June 1902, the said defendant without authority of law commenced the building of the foundation walls of a new brick addition to her said house said walls being along the east side of the lots before referred to of the complainant. That the said defendant since that date, by her servants, agents and employees, partially erected and was still engaged in building a superstructure upon said foundation walls which have about reached the level of the ground, the intention of said defendant being as complainant is informed and believes to carry said superstructure to the height of three full stories besides the basement story partly above the ground."

The bill prayed that the defendants naming each of them, their agents, servants and employees "be perpetually enjoined and restrained from further proceeding with the erection of said addition in the seventh and tenth paragraphs of this bill described, and further that the defendant Carrie L. Munn be enjoined and required

to remove the said structure so far as the same is already built and so far as the same deprives the dwelling of the complainant of
34 light and air and to restore such part of the land now occupied by the partially built walls of said addition so far as it interferes with the light and air of said premises of your complainant, to the same condition in which it was before the commencement of the erection of said addition and that each of said defendants be enjoined and restrained during the pendency of this suit from further proceeding with the erection of the addition in the tenth paragraph of this bill described."

On the said 14th of August the Court passed the following order: "That the defendants and each of them show cause before this Court upon the 4th day of September, A. D. 1902 at the opening of court, why the prayer of said bill, asking for a permanent injunction be not granted, with the option to apply at an earlier date for a hearing upon proper notice to counsel for complainant.

It is further ordered that until the hearing upon said order to show cause, the defendants and each of them, be restrained and enjoined from continuing the erection of the addition to the dwelling specifically referred to in paragraphs seven and ten of the bill of complaint."

Mrs. Munn was then travelling in Europe with her husband the defendant Charles A. Munn. For this reason their answer was not made and filed until the 30th of October, Mr. Munn returning to this city for that purpose. On the 25th of November 1902, after hearing the cause, an order was made by the Court dissolving the injunction, discharging the rule to show cause and dismissing the bill of complaint.

The complainant appealed from this decree and on the 23d of May 1903 the mandate of the Court of Appeals affirming the
35 decree was filed in this Court.

Upon the decree of this Court dissolving the injunction, the work of reconstruction was again commenced and prosecuted with more or less delay until substantially completed in April 1903.

It appears in proof that this property was purchased by Mrs. Munn some years ago at a cost of seventy thousand dollars and that since that time sundry improvements or additions have been constructed at a substantial cost. The house was purchased and maintained for the occupation of Mrs. Munn and her family and was furnished in a style corresponding to its character and size It was the practice of the family to occupy the house from the fall until the late spring and for the remainder of the year they spent the time at other localities in this country or abroad. The progress of the work on this addition at the date of the restraining order was such as to render the house for dwelling purposes practically uninhabitable. It is true that some portions of the premises might have been used for living purposes but not with the degree of comfort and convenience to which the owner of the property was entitled.

The work was commenced the first week in July and was intended to be completed in four months, which would have brought the completion to the early part of November, in time for the family to re-

sume their occupation for the fall, winter, and spring. At the date of the restraining order approximately a month and a half of the time had elapsed and a proportionate part of the work done. The order was dissolved by decree of this Court on the 25th of November so that three months and ten days of valuable time for this character of work had been wasted. The work was not completed
36 and the house ready for suitable occupancy until late in April or very early in May of 1903, near the time at which it was the custom of the family to leave the city for their summering.

The defendant Mrs. Munn claims to have suffered damages by reason of said injunction in the following respects.

| | |
|---|---|
| Loss of use of the house for the season of 1902 to 1903.. | $10,000.00 |
| Damages to the furniture in said house..... | 1,500.00 |
| Additional compensation paid architect..... | 100.00 |
| For attorney's fees in procuring the dissolution of the injunction and arguing the cause in the Court of Appeals ..... | 750.00 |
| The defendant Charles A. Munn died pending the proceedings in this cause and Mrs. Munn as the executrix of his last will claims the allowance of expenses incurred by him in journeying from Carlsbad to Washington to make answer to the bill of complaint and return to Carlsbad..... | 350.00 |

It will be convenient to leave the claim for loss of use of the premises and consider first the other claims presented by Mrs. Munn in her own right.

She testifies that as a result of the injunction they did not return to the house until the fall of 1903 and that upon their return she found the house badly damaged by the exposure of the premises resulting in an accumulation of dust which damaged the decorations, pictures, furniture, curtains and carpets, that she employed a decorator, giving his name and address, to renovate the furniture and draperies and thinks his bill amounted to fifteen hundred
37 (1500) dollars, stating that he can tell more accurately about the expense.

Mrs. Munn is the only witness who testified with regard to this claim and the evidence is deficient in all essential respects. It fails to show the extent of the injury if any there was, or the cost of its repair or renovation. On the contrary she expressly admits her inability to do this in several portions of her evidence and refers to the decorator employed to do the work for information on these points. This party was not called to testify.

Nor does the evidence show that any part of the alleged injury was the result of the restraining order. The prohibited work was suspended from the 15th of August to the 25th of November while other work upon the property was carried on which was much more likely to cause the alleged injury than that covered by the order.

The proof submitted in my judgment wholly fails to support this claim.

The claim for additional compensation paid to the architect is based upon his statement that the delay resulting from the restraining order occasioned a greater number of visits in his capacity of superintendent, the time contemplated as necessary for the completion of the work being considerably extended. It appears from the testimony of the architect that his original agreement for compensation was to be six hundred (600) dollars based upon the estimated cost of the construction, of ten thousand (10,000) dollars. The proof submitted tends to show that the aggregate cost of the construction did not reach the said sum. Nor does it appear that any specified extra service became necessary by reason of the delay and such service so far as it related to the work covered by the
38 restraining order was only such as might be reasonably anticipated in relation to any contract for building construction. I do not find this claim sufficiently established to justify its allowance.

Taking up the claim for the loss of the use of the property resulting from the restraining order it appears in proof that the work on the addition to the main house was commenced the first week in July and was intended to be completed in four months which would have brought the completion to the early part of November in time for the family to resume their occupation. At the date of the restraining order approximately a month and a half of the estimated time had elapsed and a proportionate part of the work done. The work was then suspended until the decree of this Court on the 25th of November dissolving the restraining order so that three months and ten days of useful time of this character of work had been wasted. The building of the addition was not completed and the house ready for suitable occupancy until late in April or very early in May of 1903 near the time at which it was the custom of the family to leave Washington for their summering. They were therefore deprived of the use of the property for the entire season of customary occupation.

In this connection it is contended on the part of the respondent Hutchins that after the dissolution of the restraining order the work was not prosecuted with reasonable diligence and considerable testimony has been submitted upon this issue. It appears in proof that on sundry days during the months of December, Janu-
39 ary, February and March the work was suspended and the reason assigned is that the character of the work to be done at such time, being mainly the laying of brick and plastering, the condition of the weather rendered it unsafe to proceed. Upon this point an extended controversy ensued here in the line of proof and argument as to the condition of temperature which renders construction of the character described unsafe or justifies its suspension. Witnesses called to testify as experts, differ materially in their opinions, while most of them agree that in such weather as prevailed during the time in question, work should have the protection of artificial heat in order to render its construction safe.

It seems to me that a sufficient answer to the contention of the respondent in this respect is that the owner of the property was only bound to use reasonable diligence in the prosecution of the work

having in view its timely completion, safety and durability. In this case Mrs. Munn employed an architect and a builder both of whom are concededly qualified for the duties of their respective callings and I must hold that she was justified in submitting to their judgment the question of when the work should proceed having due regard to the weather condition and other circumstances. I do not find the claimant Mrs. Munn to be responsible for unreasonable delay in the prosecution of the work after the dissolution of the restraining order.

The measure of damages must be the value of the use of the property during the period from the first part of November to the following May. The method of ascertaining this value is the immediate question. Ordinarily this is accomplished by establishing the rental value or as expressed by Sedgwick "the actual annual
40 value." In the present case this could only be proved by the evidence of persons qualified by experience in the business of dealing with real estate of the character of the property in question and conversant with its locality and surroundings. Several witnesses have been produced on each side of this controversy who have testified their opinions on this point their estimates of the rental value varying from a minimum of five to six thousand dollars to a maximum of ten to twelve thousand dollars per annum.

Some of these witnesses further testify that generally property of this character is occupied only from November or December to May or June and that the rental value of such term is about the same as for the year.

That there is a Washington season which affects the rental term and occupancy of a certain class of property is a fact so generally recognized as to come nearly if not quite within the scope of judicial notice. The property in question is of that class.

This so-called season was the customary period of occupation by Mrs. Munn and her family.

The claimant Mrs. Munn is entitled to the value of the use of the property during the season of deprivation and the evidence is to be applied to that period not solely for the purpose of showing what she lost as rent or income but to determine what it would have cost her to procure the use of other property approaching her own in location, condition and equipment during such time.

Taking the estimates of the several witnesses touching the rental value of Mrs. Munn's property I find a fair mean to be the sum of eight thousand dollars per annum of which I find three-
41 fourths being six thousand dollars to be the reasonable value of the use of the property for the period during which she was deprived of its use, by reason of the injunction.

The remaining claim of Mrs. Munn in her own right, is that of the cost of attorney or counsel fees incurred by her in seeking the dissolution of the restraining order and defending against the permanent injunction. There seems to be a remarkable difference of rule and practice in this respect between the Federal Courts and those of the State jurisdictions. Such fees and costs are allowed in most if not all of the states, in some by force of existing statutes and

in other- upon general principles of equity while in the Federal Courts the rule has been otherwise. Perhaps the most recent and elaborate enunciation of the Supreme Court of the United States upon this point is found in the case of Tullock *vs.* Mulvane, 184 U. S., p. 512, and in the case of the Railway Company *vs.* Elliott decided at the same term and reported at p. 531 in the same volume. These cases distinctly and clearly state that counsel fees can not be allowed in estimating damages upon an injunction bond, and would seem to dispose of the claim here.

There remains for consideration the claim presented by Mrs. Munn as the executrix of her husband's will for the alleged cost and expenses of his trip from Carlsbad to Washington to answer the bill of complaint and his return to Carlsbad. While the absence of the claimant and her husband from the country was under the circumstances a misfortune or inconvenience it must be assumed that upon leaving home for foreign countries they assumed the risk of such cost or expense as might result from such absence. I am unable to find a case in which a claim of this character has been
42 allowed. No authority was cited by counsel upon either side in this respect and apart from the indefinote character of the proof as to the cost I feel compelled to exclude the claim from allowance.

I have to report under the direction of the order of reference that the defendant Carrie L. Munn has sustained damages in the sum of six thousand (6,000) dollars by reason of the wrongful and inequitable suing out of the said injunction.

I find that no damage was suffered or sustained by either of the other defendants by reason of the said injunction.

JAS. G. PAYNE, *Auditor.*

*Testimony.*

In the Supreme Court of the District of Columbia.

Equity. No. 23468.

STILSON HUTCHINS
*vs.*
CHARLES A. MUNN ET AL.

TUESDAY, *April* 26, 1904—10:30 a. m.

Hearing pursuant to notice.

Present: Messrs. Brandenburg for the complainant and Messrs. Maddox and Gatley for the defendant Mrs. Carrie L. Munn.

Mrs. CARRIE L. MUNN having been sworn testified as follows:—

By Mr. MADDOX:

43 Q. Where do you live? A. In Washington, D. C.

Q. Where? A. On the corner of 16th street and Massachusetts Avenue.

Q. Are you the owner of the premises? A. I am.
Q. How is it numbered? A. 1601 Massachusetts Avenue, N. W.
Q. From whom did you purchase it? A. I purchased the property from Mr. William Windom who built the house.
Q. Ex-Secretary of the Treasury? A. Yes and I believe he was a Senator when we bought the house.

Mr. MADDOX: I offer in evidence a certified copy of the deed from William Windom to Mrs. Munn conveying lot 141 in square 181 in this city.

Q. What did you pay for the house? A. $70,000.
Q. In cash? A. In cash.
Q. What changes have you made in it since you purchased it? A. A great many. We have built on several rooms, a billiard-room, a smoking-room, a laundry, several bath-rooms, and a safe.
Q. Also a porte cochere? A. Yes. A side entrance and electricity we have had put into the house since then, new plumbing and a new side-walk.
44 Q. What is the approximate cost as near as you can get at it of these changes you have made?

Mr. BRANDENBURG: I object to that as irrelevant.
The AUDITOR: The objection is overruled.

A. It is very difficult for me to tell. Mr. James E. Hill has all the bills and would be able to give the approximate cost of it.
Q. What is the character of the material throughout the house? A. The house is built of the best material and the improvements recently made have all been of the best material, good plumbing, good heating arrangements, very good, all first class, in every way the house is very well furnished as such a house would naturally be.
Q. Will you describe the surrounding of the house, how does it front? A. It has an east and south frontage, sunshine and very well located.
Q. Is it on Scott Circle? A. Yes. One of the best situations in the city.
Q. How many rooms has it? A. About twenty-one or twenty-two rooms not counting the small rooms of course, the bath-rooms, counting the living rooms only, it is a very large house.
Q. How is it furnished? A. It is furnished as such a house ought to be, with perfectly good furniture, handsome pictures, bric-a-brac, in keeping with the situation of the house, it might be called a luxuriously furnished house.
Q. Have you any idea of the value of the furniture?
45 A. No, I am -fraid I have not. I don't think I could tell that. It would be rather difficult, it has been furnished at different times.
Q. What in your opinion is a fair rental value of the house? A. The house across the street, Mrs. Morgan's house, on the corresponding corner is rented to Mr. Harrison for $14,000 for the winter season, the six or seven months he is occupying it and Mrs. Barney's house which Secretary Root occupied he paid one thousand — month for eighteen months.

Q. Where is that? A. On Rhode Island Avenue just across from us, and Mrs. Bate's house not as fine a house as mine rents for $10,000 a year.

Mr. BRANDENBURG: I object and move to strike out.
The AUDITOR: The ruling reserved.

A. I think $12,000 a year would be a fair rental value for my house.

Q. Was your house furnished in 1902 practically as it is now? A. Just as it is at present.

Q. Where were you in August 1902 when you first heard of the issue upon you of the restraining order in this case? A. When we heard of the restraining order, we were in Carlsbad in Austria or Bohemia, taking the cure, with our family, the children were with us, and I think it was in August that Mr. Maddox informed us that the injunction had been served.

Mr. BRANDENBURG: I object.

46 Q. What did Mr. Munn do after that? A. Mr. Maddox seemed to think it necessary that either one of us would have to return from Europe to see about this injunction.

Mr. BRANDENBURG: I object to the question and answer, it relates to what Mr. Maddox told either Mr. or Mrs. Munn.
The AUDITOR: Ruling reserved.

A. He took the steamer and returned to Washington to see about having the injunction dissolved, it kept him——

Mr. BRANDENBURG: I object.
Mr. MADDOX: I offer to prove that in consequence of the wrongful suing out of the restraining order defendant Charles A. Munn was compelled to give up his health cure at Carlsbad and return to Washington for the purpose of making answer to the bill of complaint filed in the cause by Mr. Hutchins, that he remained here until late in November 1902 then returned to Carlsbad at an expense of $1500.

Q. What is the reasonable cost of a journey from Carlsbad to Washington and return? A. About $1500 I should think, the accommodations on the steamer cost one thousand dollars.

Mr. BRANDENBURG: I object and move to strike out.
The AUDITOR: The objection is sustained.

Q. Do you know when the restraining order was discharged? A. On the 21st of November 1902.

Q. What changes if any in your plans for the winter were caused by the delay in the finishing of these additions to your dwell-
47 ing house? A. Well, our plans were decidedly changed. It is our custom to occupy the house in the winter after spending the summers away, as this restraining order was not dissolved until the 21st of November the building then had to go on and it prevented us from occupying our house until late in the spring.

Q. When was it finished? A. Not until last spring, very late, this last summer.

Q. What do you mean by saying you occupy your house during the winter months? A. We generally return in October and remain until May or June then go off for the summer, the warm months.

Mr. BRANDENBURG: I object to the question and answer for the reason it does not appear what their intention on this particular occasion was.

Q. Did you or not occupy the house from November 1902 to the fall of 1903? A. No.

Q. What was the condition of the decorations of the walls and furniture when you returned in the fall of 1903? A. I found the house very badly damaged from the dust which was obliged—a wall was torn away and this restraining order was served and it left my house open and exposed for several months. Of course during this delay there was an accumulation of dust which damaged my decorations and pictures, furniture, curtains and carpets, in fact the entire house was greatly damaged.

Mr. BRANDENBURG: I object and move to strike out.

48 The AUDITOR: The objection is overruled.

Q. Who was employed, Mrs. Munn to redecorate the rooms and renovate the furniture and drapery? A. Mr. W. E. Clark a decorator on H street.

Q. What was his bill? A. I think $1500. Mr. Clark can tell you more accurately about that.

Q. Were you subjected to any other expense other than Mr. Clark in renovating your house? A. I don't think so, Mr. Clark had charge of it.

Q. What was the condition of the picture frames? A. Very badly damaged.

By Mr. BRANDENBURG:

Q. Mrs. Munn when did you buy this property? A. 1888, the spring of 1888.

Q. At that time, did you observe the peculiar way in which Mr. Hutchins' house was constructed with reference to the area way between the two houses, 1601 and 1603 Massachusetts Avenue? A. I can not answer that question.

Mr. MADDOX: I object.

The AUDITOR: The objection is sustained.

Mr. BRANDENBURG: I note an exception.

Q. At what time did you leave for Europe in the year 1902? A. I think it was in April.

Q. When did you return? A. We returned in September, 1903.

Q. Where did you remain during this entire period, between April 1902, and September, 1903? A. We were quite a long time

49 in Carlsbad, we were in Dresden and traveling, but most of the time in Paris, in those three places.

Q. What time did you say you ordinarily leave for Europe? A. We usually leave in the early summer or spring, in April or May or June, it depends.

Q. What do you mean by "it depends?" A. When we feel that we want to go, we are usually free to move about.

Q. Mrs. Mann, what was your custom with reference to returning from Europe? A. In September or October.

Q. For how long have you been going to Europe? A. We don't go regularly to Europe. We always go away for the summer somewhere, we don't always go to Europe, but we never occupy our house in the summer.

Q. As a rule than I understand you don't occupy your house from April or May until September or October or November? A. That is our usual custom, September or October is the usual time.

Q. During that time you usually close it up? A. For the summer, yes.

Q. Now, Mrs. Munn, in the fall of 1902 was it not your intention to remain in Europe that fall? A. That was not our intention so far as I knew anything about it. We had our cabins engaged to return to Washington and had to give them up, perhaps at a sacrifice.

Q. You know that of your personal knowledge? A. Yes.

50 Q. Mrs. Munn, I wish you would stop a moment and think, do you not recall that in the summer or early fall of 1902 that you wrote to some friend or acquaintance in the city of Washington to the effect that you did not expect to return to the United States for the winter? A. No.

Q. You did not write that? A. No, I have no recollection of it.

Q. Do you think it possible that you might have written that and not be able to recall it at this time? A. I do not think it is possible.

Q. Was it to some one in New York? A. No, or any part of the world.

Q. Mrs. Munn, you stated that when you returned to your house in the fall of 1903 you found your furniture badly injured do you know whether or not that was, you have no personal knowledge that that was caused by reason of the delay in the construction of the addition as a result of the injunction? A. I only judge by comparison, when I have returned to my house in other years, I found my house in good condition this year it was very badly damaged.

Q. When you leave for Europe as a rule do you leave some attendant in your house during the summer months? A. Yes.

Q. A caretaker? A. I either have my house wired, or leave a caretaker.

Q. Do you recall whether you left a caretaker during the

51 summer of 1902? A. I have had the same servants for twelve years.

Q. Do you recall whether you left a caretaker or had the house wired? A. I had it wired, but on account of the workmen, some of the wiring had to be taken out and I had a caretaker there.

Q. In the fall when you return from Europe as a rule, don't you find dust on the furniture and paintings? A. Yes, some, but never any excessive amount, this amounted to damage, the house was

damp by reason of the furnace not being operated and the house not being occupied.

Q. Then you say that there was considerable damage by reason of the fact that the furnace was not in operation? A. I don't know, the house was not available for occupancy and it was damaged by dampness as naturally any house not inhabited is.

Q. You have stated that some of the damage was due to dust and dampness, owing to the fact that the furnace was not in operation? A. If I had been living in the house, my furnace would have been running and the house kept clean, but it was obliged to be left unoccupied as it was not inhabitable.

Q. How long prior to 1902 had your pictures been regilded? A. I don't know just how long.

Q. Don't you recall whether it was several years? A. I would not know anything about that.

Q. Can't you recall whether you have had them regilded since the time you purchased them? A. Probably, I can't tell
52 whether we did or whether we did not.

Q. When you say that redecorating was necessary to which portion of the house are you referring to? A. The portion exposed to the walls and the house was entirely affected by the house not being lived in and this dust lying around and not being warmed, and especially having an opening in it.

Q. This $1500 for this decorating to which you refer I wish you would please state the particular rooms this decorating was in? A. I gave this all to a decorator and he had entire charge of it, the drawing room, the music room and the basement had to be redecorated.

Q. Those the only three rooms? A. They are very large rooms.

Q. Are they the only rooms? A. The paper was falling off of different rooms upstairs even in the third story, it was more or less affected throughout the house.

Q. I would like to know the particular rooms to which this $1500 applies? A. All over the house, the drawing and music rooms and the basement and all over the house.

Q. So as a matter of fact this $1500 covered the entire decorating throughout the house and not the rooms immediately adjacent to the opening in the wall? A. Yes.

Q. This decorating as I understand it included papering, painting and kalsomining? A. I think so.
53 Q. Don't you know? A. Yes and for cleaning the carpets and curtains, I have very expensive curtains and draperies and they were covered with dust, especially this brick dust that had been lying around for so many unnecessary months.

Q. So then this $1500 included as well as decorating the cleaning of carpets and curtains? A. Yes.

Q. You referred to your furniture being damaged, I wish you would specify as nearly as you can the furniture injured, the rooms that *was* damaged? A. I can not do that, I am only speaking in a general way, Mr. Clark would have to tell you about that, I am *not* able to do it.

Q. You have been living in the house? A. I have occupied the house yes.

Q. Did you see the furniture when you returned from Europe? A. I did.

Q. At that time had it been repaired? A. No.

Q. It seems to me that you could tell what particular furniture was damaged? A. I have put it into the hands of — competent man and he attended — it for me, I can not enumerate the tables and chairs the rooms directly adjacent to the opening — the wall were damaged, the drawing room, the music room and the basement.

Q. Can you state what it cost to repair the furniture in these particular rooms to which you have referred? A. I can not, I am
54 giving you the approximate value of $1500, I did not come prepared to give the figures, I could get them perhaps.

Q. Is it possible for you to state what injury was actually done to the drawing room? A. No.

Q. Can you fix the approximate injury in any other rooms adjacent to the opening? A. I can not.

Q. Please state if you know any specific case of damage or injury to any of your furniture as a result of the opening in the wall? A. I must repeat what I have said before, I put it in the hands of a competent man to go entirely over my furniture and I can not give every piece of furniture.

Q. Mrs. Munn, do you ordinarily leave your lace curtains up in the summer when you leave your house? A. I don't think I made any item of lace curtains, I always put my lace curtains away in the summer, consequently they were not damaged, I have other curtains in my drawing room that I leave up.

Q. What curtains do you refer to? A. I have silk curtains in the drawing room, and lace shades, they were taken down and as a consequence were not damaged.

Q. Then your claim for damages related to silk curtains in the drawing room? A. And there were silk curtains in the library.

Q. I am endeavoring to ascertain the damage to the silk curtains in the drawing room? A. I can not answer.

55 Q. Have you resided in the house since your return in the fall of 1903? A. No, I think not.

Q. How much of the time were you away? A. We have occupied the house since December first to the present time.

Q. There was no other damage to your property than from dust and from dampness? A. I don't know how to answer that, there was damage, I can't detail damage.

By Mr. MADDOX:

Q. You stated in your cross-examination that you could not tell when you had your picture frames regilded, can you state their condition when you went away? A. Very satisfactory, we did not see any reason for giving an order to reburnish them, and we found them in such a condition that we had to have them reburnished.

Adjourned.

HUTCHINS
*vs.*
MUNN.

WEDNESDAY, *June* 29, 1904—10:30 a. m.

Hearing pursuant to notice.
Present: Messrs. Maddox and Brandenberg.

Mr. WILLIAM P. LIPSCOMB, having been sworn testified as follows:

By Mr. MADDOX:

Q. Where do you live? A. My home is 929 S street, but I stay in the country just now.

56 Q. What is your business? A. Builder and contractor.

Q. How long have you been engaged in that business? A. Practically all my life.

Q. That is forty-five years? A. Yes, fifty years.

Q. Where have you been engaged in that business? A. Washington, D. C.

Q. Did you know the late Charles A. Munn? A. I met him once or twice.

Q. What did you have to do with the building of an addition to his house in the latter part of 1902 and the early part of 1903? A. I built that addition.

Q. As superintendent or contractor, in what capacity? A. As superintendent, I did it on a commission, a percentage basis.

Q. When did you begin work? A. About the first week in July.

Q. In the ordinary course of business of building operations within what time could that work have been completed? A. We expected to do that work in three or four months, in the late fall or early winter.

Q. That would bring you to when? A. Four months at the outside.

Q. That would bring you to the early part of November? A. Yes, about the middle of November.

57 Q. Did you work continuously at the job? A. We did until we were enjoined and stopped.

Q. When were you enjoined, do you recall? A. About the 15th of August.

Q. Then work was stopped until what time? A. Until about the 20th of November, I don't recall the exact date.

Q. If you have any data you may examine it? A. About the 25th of November, I think.

Q. How do you get at that? A. From the pay rolls, if a man starts to work on Monday we don't pay him until Saturday.

Q. What was your first pay day in November on that job? A. The 28th of November.

Q. From that, you think the work commenced somewhere in that week? A. Yes.

Q. Do you remember the condition of the weather in December,

January, and February following? A. I don't. I can't say that I remember it.

Mr. MADDOX: I offer in evidence a transcript of the Weather Bureau showing the maximum and minimum temperature from the 22d of November, 1902, to the 22d day of February, 1903, it is marked Exhibit No. 1.

Q. When was the building finally completed as far as the plastering and trimming out was concerned? A. I don't quite remember that, I think about May.

Q. Do you remember when the plastering was finished? A. I don't believe I remember that.

58 Q. What was the total cost of the addition including your commission?

Mr. BRANDENBURG: I object.

Discussion.

The AUDITOR: The objection is overruled.

A. The amount of the bill is $6,954.46, the commission of ten per cent. would be $695.45.

Q. That was your compensation for superintending the construction of that building? A. Yes.

Q. Did you purchase the material? A. Yes.

Q. What was the character of the material used? A. The best that could be had.

It is understood that from this time on the examination is in regard to the defendant Lipscomb's claim.

Q. In what way if at all were your labors added to or increased by reason of this injunction or restraining order in the matter of time? A. The value of the time?

Q. Yes. A. I suppose about $150 or $200.

Q. Will you explain that? A. It took that much longer to do the work, I could have done it in three or four months and it took to the following spring.

Q. What is the estimate you put this additional trouble?

59 A. I don't know that I had any special trouble, only the work was hanging on, there was no special trouble, I could not go ahead with it.

Q. Could it be done as expeditiously in the winter months as in the summer and fall months? A. No, I think not, very much worse weather in the winter.

By Mr. BRANDENBURG:

Q. This was not the only job you had? A. No.

Q. During the summer and fall of that year as well as in the winter of 1903 you had considerable other work? A. I am always employed.

Q. As I understand it you as a rule conduct several undertakings and jobs at the same time? A. Yes.

Q. Your entire time is not devoted to any one particular job, engaged upon it? A. No.

Q. Did you have other work during August, September, October and November of 1902? A. Yes, I work all the time.

Q. Now, Mr. Lipscomb, as a matter of fact did any actual loss result to you by reason of this delay? A. No, I don't think that I can say that it did, except I had to do the work in spring time when I might have finished it in the fall and I might have done other work in the spring.

Q. The same would have been true if you had not had the contract to do at all, would it not? A. Yes.

60 Q. Can you state what time the contract required the work to be finished? A. I had no contract, I was superintending the work with the understanding that Mr. Munn wanted to get into the house in the fall.

Q. According to your best judgment, it would have taken you at least four months to complete it? A. Yes.

Q. When the restraining order was served upon you you had been engaged upon the work about a month and a half? A. I don't know, I gave you the dates, we begun on the work some time in July and stopped about the middle of August.

Q. Then according to that, if you had been left undisturbed you believe you would have completed the work in two and one-half months? A. Inside of four months from the time we began.

Q. So then if you had been employed a month and a half and had been left undisturbed you would have completed the building within two and one half months? A. Yes, from the time I started I would have completed it within four months.

Q. When you resumed the work on the 25th of November were the man at work the entire time upon this structure, until May 1903? A. They were not, they could not be.

Q. Why could they not be? A. Because the work was not there to do in the first place, and in the second place the weather was too bad, they could not work in the winter time.

61 Q. Now I will ask you whether or not it is true that on a number of occasions the men were not there because the work was not there to be done? A. I think not, I don't recall anything of the kind, of course if the weather would not permit them to work, they could not work, I don't know of any other reason.

Q. You can not state whether there were occasions when the men were not employed? A. Except on account of the weather, certainly not because of a lack of men, because I always have plenty of men.

Q. Were you upon this work every day? A. No.

Q. How far apart were your visits? A. I could not tell you that, I was there every day that the men were at work.

Q. Will you produce your pay roll showing the number of men employed upon this work? A. Yes, the carpenters.

Q. And the number of days upon which they were engaged? A. Yes.

Q. Did you have charge of any other work besides the carpenters? A. The entire work.

Q. How many men were employed on the brick work? A. I don't know.

Q. Who does? A. The man who did the brick work is dead, I could not tell, I had a contract with him to do the brick work
62 and he looked after the brick men himself.

Q. Did he not delay considerably in the completion of his contract for the brick work? A. I think not, I have no recollection of it.

Q. As a matter of fact Mr. Lipscomb do you not recall that there was a very considerable period when the side of that house remained open after the work was commenced? A. After the roof was on?

Q. I mean at any stage? A. The windows were open of course, there was no necessity for shutting them.

Q. Was there not a considerable period when that portion of the house was exposed by reason of the delays in the completion of the brick work? A. I think not, I have no recollection of it, I don't recall when we got the roof on that house, but before the severe weather set in, I don't remember the date.

Q. So then both the brick work and the roof was complete before the severe weather set in? A. I think so.

Q. Have you any recollection as to when the severe weather set in? A. I have not.

Q. Do you know if the roof was on by the middle of December? A. I could not tell you that.

Q. In what way did the condition of the weather delay you? A. We were delayed on account of the plastering, the weather may have stopped the brick men, it has been a long time and I don't remember.

63 Q. Mr. Lipscomb, in what temperature can not plastering work be done? A. It can not be done when it is freezing.

Q. What is the custom in the City of Washington in the matter of doing plastering in the winter. A. They do it by enclosing the buildings and heating them.

Q. Is that not the practice here? A. Yes.

Q. As a matter of fact can not plastering be done in freezing weather by heating the plaster? A. By heating the house.

Q. Have you had plaster heated? A. No.

Q. Was this addition in a condition that it could be enclosed and the plastering done. A. Yes, it could have been done, at an extra expense.

Q. If during the day time the temperature was above freezing there would be no postponement of the plastering? A. Yes, it is not the custom to do any plastering after the middle of November without making preparation for artificial heat.

Q. But can not you plaster when the temperature in the day time is above freezing point? A. If it will stay that way during the night.

Q. What temperature would freeze the plaster? A. I would not attempt to plaster after the middle of November without being prepared to take care of it.

Q. Can you give me any idea when this plastering was put
64 on? A. I think in March or April, I don't recall exactly.
Q. Do you know when the wood work was finished? A. Sometime in April, I can give you that definitely, if you want it, by referring to my books.
Q. Would the temperature interfere with your carpenter work? A. No.
Q. Would not? A. No.
Q. Why did you say that there were delays in the work by reason of the temperature? A. Because we could not lay the brick and there were delays in the plastering.
Q. Did Mrs. Munn pay you for your work? A. Yes.
Q. Did she pay you any extra compensation for this delay? A. No.
Q. Did you ask her for it? A. No.
Q. Did you expect Mr. Lipscomb, to get any extra pay for this work? A. I don't know that I did.

Redirect.

By Mr. MADDOX:

Q. You used the expression that the men work- all the time except when there was no work there to do, what did you mean? A. I mean that the carpenters' work was all that could be carried
65 on, as soon as the work was ready for the plasterers of course we had to suspend work.
Q. In the order of building, trim work is put in after the plastering. A. Yes, finished.
Q. Is it unsafe to build a brick wall when the temperature is 28, 4 degrees below freezing point? A. Of course it is done, I understood the question to be about plastering, bricks are laid when the temperature is above freezing in the day time and at night time below freezing for the reason that brick being dry take the water out of the mortar and it is the water in the mortar that freezes.

Mr. THOMAS N. WALSH having been sworn testified as follows:

By Mr. MADDOX:

Q. What is your business? A. Contractor and plasterer.
Q. How long have you been engaged in that business? A. About twenty years.
Q. Did you do the plastering work on the addition to Mrs. Munn's house? A. I did.
Q. When did you begin? A. I began lathing on the 14th of February 1903.
Q. Well, when did you begin plastering? A. On the 4th of March.
Q. When did you finish it? A. On the 31st of March.
66 Q. When do you generally begin to plaster houses? A. About the middle of March.
Q. On St. Patrick's day? A. Yes.

Cross-examination.

By Mr. BRANDENBURG:

Q. Mr. Walsh, when did you get the contract for doing this work, do you remember? A. Why, it was in the spring of 1902.

Q. Where were you employed prior to doing this work on the Munn addition? A. Well it would be a hard matter to tell that now, because in winter I don't do much work and as this was begun in February, I would have to refer to my books.

Q. You did some work in the winter? A. Generally repair work.

Q. How extensive is your business Mr. Walsh? A. I do from $5,000 to $20,000 a year.

Q. Have you ever done any plastering in the city of Washington in the winter? A. Yes.

Q. What method did you pursue in those cases? A. Used steam heat and salamander heat.

Q. Did you find them perfectly satisfactory? A. Very unsatisfactory.

Q. How about steam and hot water heat? A. They were all right.

Q. Then work can be done under those conditions? A.
67 Yes.

Q. Why was it not done in this case? A. I don't know.

Q. You were not asked to do the work in the winter were you? A. Well the work was not supposed to be ready, as soon as it was ready for lathing, I went in.

Q. Did you have anything to do with putting up the brick work? A. I did not, Mr. William H. Carson did the brick work.

Adjourned to Thursday, June 30, 1904, at 10 A. M.

HUTCHINS
*vs.*
MUNN.

THURSDAY, *June* 30, 1904—10 a. m.

Hearing pursuant to adjournment.

Present: Messrs. Maddox and Brandenburg.

Mr. RALPH JENKINS having been sworn testified as follows:

By Mr. MADDOX:

Q. Where do you live? A. 1732 Massachusetts Avenue.

Q. What is your business? A. Real estate, insurance and loans.

Q. How long have you been engaged in that business? A. About two years.

Q. Prior to that time had you made yourself acquainted with the trend of real estate and the value of property and the rental value of houses in the District of Columbia? A. Yes, I have been more
68 or less familiar with it for a good many years.

Q. Are you acquainted with the Munn house 16th and Massachusetts Avenue? A. I know it very well.

Q. What was your relation with Mr. Munn and his family? A. He was one of my most intimate friends, the last time he was in Washington, we were together until he left the city.

Q. Did you have charge of the house in a general way? A. Yes, he placed it in our hands, we had the full supervision of it.

Q. Are you acquainted generally with the rental value of furnished houses of that size in the city? A. I am.

Q. And in your opinion what is a fair rental value of the Munn house, per year? A. That house should rent for anywhere from $10,000 to $12,000.

Q. At what season of the year is it usual to procure tenants for such houses as that? A. Well, houses of that character are seldom occupied before the first of December and generally occupied up to June, perhaps the first of June.

Q. Then the season of the year is about six months from December to June? A. I think so, yes.

69 Q. It is the custom in the City of Washington for houses of that size and character to be vacant during the summer months? A. Always so.

By Mr. BRANDENBURG:

Q. Have you rented any houses in that immediate neighborhood? A. I have not in that immediate neighborhood.

Q. Do you know anything about the rents of the houses adjacent thereto? A. Yes, I think so.

Q. What houses for instance? A. There are a good many large houses in that neighborhood.

Q. I mean at the corner of 16th and Massachusetts Avenue, N. W. A. Yes, there is the house on the opposite corner the Morgan house, it was rented last winter.

Q. Did you rent that house? A. No, but I know the broker who did rent it and I know the tenant.

Q. You have no personal knowledge of the rental value except what you have heard from others? A. I know practically about what the rent was.

By Mr. MADDOX:

Q. What was it? A. $13,000.

Mr. BRANDENBURG: I object to so much of the answer as is merely hearsay.

The AUDITOR: The objection is overruled.

Q. This rent, is that for the entire year? A. Well, it is practically for a season, the season being a year as far as large houses are concerned.

70 Q. As a rule is not the rent payable monthly or quarterly? A. Payable monthly.

Q. And the tenant has the right to occupy it one year if he desires? A. That is purely a condition which would have to be so stated in the lease.

Q. In other words if a man rented a house for a year then you

say it would be necessary for the lease to provide that it meant a year. A. It would have to be entirely as the lease read.

Q. For houses of this character when would you say the leases were usually made? A. In the winter months.

Q. What time of the year are they usually entered into? A. Well, that is a question which might be answered in this way. The tenant may begin to look for a house during May or June for the following winter, and then again they may let it all go until fall and then come to the city and look for a house.

Q. But I presume that the first of December or the first of January would be pretty late for leasing houses of that character? A. Yes.

Q. Usually enter into such a lease not later than the first of October? A. Yes.

By Mr. MADDOX:

Q. But you said that occupation of the houses usually began the first of December? A. Yes.

71 JULY 7TH, 1904—11 o'clock a. m.

Hearing pursuant to notice.

Present: Mr. Maddox and Mr. Brandenburg.

Whereupon DAVID LINDSAY, being duly sworn, testified as follows:

Direct examination.

By Mr. MADDOX:

Q. Where do you live? A. I live in the Montgomery, North Capitol and N streets.

Q. In this City? A. Yes.

Q. What is your business? A. Passenger agent of the International Mercantile Marine Company.

Q. How long have you been engaged in that business? A. Twelve years.

Q. Are you acquainted with the rates of travel between here and points in Europe? A. I am.

Q. What is the reasonable expense of a person travelling first class from Carlsbad to Washington in September and returning in November?

Mr. BRANDENBURG: I object. There is nothing to show that this witness knows what the reasonable expenses of the trip would be.

72 The AUDITOR: Ask him what is the cost of transportation.

Q. What is the cost of transportation from Carlsbad to Washington in September and from Washington to Carlsbad in November? A. At least $325.

Q. Does that include tips or only fares? A. That would be for the mere transportation, first class.

Q. What, if any, necessary expenses are connected with such

trips? A. On steamships it is usual to give stewards ordinary fees for their services during the voyage, and for a single individual this would probably amount to between ten and fifteen dollars each way.

Q. You say that is a customary expense? A. Yes.

Cross-examination.

By Mr. BRANDENBURG:

Q. How do you make up this transportation from Carlsbad to Washington? That is $325. for the round trip? A. The round trip?

Q. Now, is it customary with people traveling to Europe, to travel first class or second class? A. First class.

Q. Always? A. Not always. There are three classes of passage on ships, but the ordinary gentleman traveling would travel first class because he is used to that probably in his home.

73 Q. Isn't it customary for gentlemen as a rule, and isn't it a fact that the largest part of the travel is composed of people who travel second class? A. No, I think not, from the statistics as we have them.

Q. Is there any material difference between first class and second class passage? A. There is on board the ships, because the second class passengers are restricted to their own quarters which are not nearly so desirable as the first class accommodations.

Q. Have you any personal knowledge of the expense from the Seaboard to Carlsbad and from Carlsbad back to the Seaboard? A. We have the rate from Antwerp to Carlsbad which is $24., and Antwerp is a very central point for all ports in Europe.

Q. You don't know when Mr. Munn came to the United States and when he returned? A. I have no knowledge of Mr. Munn's traveling.

Q. How did you arrive at this rate of tips to stewards from ten to fifteen dollars each way? A. It is ordinarily the case that the bedroom steward is given $5. for his services at least, and the same amount is given to the dining-room steward. And there is also a fee given to the smoking room steward and one to the deck steward, but the deck steward and the smoking room steward do not usually receive as much as the dining-room and bed-room steward; but altogether it would probably make up $15. each way.

74 Q. That is not a part of the fare? A. The company's statement states that the rates do not include fees to stewards. The expectation is that the fees will be paid, though they are not a part of the transportation, of course. Nobody could be forced to pay any amount to a steward, but the steward would not wait on him in any way at all if he did not expect some pay.

Q. Would the company tolerate a steward who refused to give a passenger any attention because he was not inclined to give him a tip? A. The company would not entertain any complaint against one of their passengers, but they seem to think that the passenger

receiving the attention of stewards in this personal way should entitled the steward to a fee.

Q. This is a mere gratuity on the part of the passenger? A. Well, in ocean travel it is looked up- nowadays more than a mere gratuity. It is looked upon as a necessary expense.

Q. But you don't reckon it in m*ka*ing up the cost of transportation? A. Well, it is a matter so personal between the steward and the passenger that we can not estimate what the passenger's fees ought to be to the steward.

Redirect examination.

By Mr. MADDOX:

Q. Did you know the late Charles N. Munn? A. I did.

Q. Did you ever book him for Europe? A. Several times.

75 Q. How did he usually travel? A. Mr. Munn usually took very high class accommodations for himself. I have booked him at about $750 for one way for his own passage.

Q. What sort of a room was that? A. He took on that occasion a suite of rooms, that is, two rooms with a private bath.

Q. That is on the top deck? A. On the top deck of the steamer.

HORACE H. WESTCOTT being first duly sworn, testified as follows:

Direct examination.

By Mr. MADDOX:

Q. Where do you live? A. 1310 16th street, northwest, in this city.

Q. What is your business? A. Real estate.

Q. Are you alone or in partnership? A. I am in the firm of Westcott and Story, John B. Story, Jr.

Q. How long have you been engaged in that business? A. Well, we have been in partnership seven years. Altogether I have been in business fourteen years last January.

Q. In the real estate business? A. Yes.

Q. Does that include the renting of houses? A. Principally.

76 Q. With what class of houses does your firm generally deal? A. Mostly large furnished houses in the Northwest, and business property in the business section.

Q. Are you familiar with the values of houses generally? A. Yes.

Q. Do you know the Munn house at the corner of 16th Street and Massachusetts Avenue? A. Yes.

Q. Have you been in it? A. Yes.

Q. And know the character of the furniture? A. Yes, very well.

Q. And the arrangement of the house? A. Yes.

Q. In your opinion what is the rental value of that house per year furnished? A. The year and the season are practically the

same. The rentals come about the same. There is very little difference.

Q. Between the year and the season? A. Between the year and the season. It is pretty near the same thing in houses of that character, and that house compared to other houses which are about the same size that I have rented, should rent for between eight and ten thousand dollars a year or the season, which does not make any difference.

Q. What do you mean by the season? A. Well, the season would be from maybe October or November up until the following
77 June, or it might run from December up to the following June.

Q. When are leased houses generally rented? A. They are generally rented in September or October. During the month of September or even earlier than that some people come down to look around for houses before the crowd comes down.

Q. And they take them for the season? A. They take them for the season or the year.

Q. What would be the chances of renting such a house as that for three or four months beginning with February or March? A. It would not be a probability by any means.

Q. It would be merely a chance? A. A very slim chance, except perhaps during Inauguration time when somebody wants to come and spend a month, and they they would pay big prices for it.

Cross-examination.

By Mr. BRANDENBURG:

Q. You have been in this house? A. Yes. It is just two doors below my residence.

Q. Have you rented any houses in that immediate vicinity? A. Yes, I have rented quite a number.

Q. Now, as a matter of fact, houses of that character are rented as a rule, are they not, during the month of October? A. Not necessarily. They may be taken in the summer, to commence in September or October or November; very seldom later than November.

Q. Very seldom later than November? A. That would
78 be the commencement of the lease. As a rule it is earlier than that.

Q. As a rule it is earlier than that? A. Yes. The commencement of the lease would start say in October or November.

Q. And as a rule tenants who occupy houses of that character would be in by the first of November or thereabouts? A. Well, their lease might start—they might not move in but the lease would start two or three months before they actually take possession. But the season is considered as running from October, November or December through to the following June.

Q. Mr. Westcott, I suppose Mr. Maddox has discussed with you the conditions under which this house remained vacant, did he not? A. I knew the conditions because I live right there.

Q. Now, I will ask you this question: Isn't it rather unusual with

a house like that that the tenant would move in say in December? A. No; it is not unusual. You mean as late as December?

Q. Yes. A. No, it is not. Very often they move in as late as December after having their leases actually start maybe in October, considering that the full season.

Q. Do they ordinarily come in in the winter in that way? A. Very often; about half and half.

Q. But there is no rule about it? A. There is no rule
79 about it. They might come in in October, November or December.

Redirect examination.

By Mr. MADDOX:

Q. Mr. Westcott, you were summoned to appear here as a witness? A. Yes.

Mr. MADDOX: I offer in evidence as Exhibit No. 2 the pay roll called for by Mr. Brandenburg.

H. PRESCOTT GATLEY being first duly sworn, testified as follows:

Direct examination.

By Mr. MADDOX:

Q. You are a member of the Bar. A. Yes, sir.

Q. You have been associated with me since when? A. About four years.

Q. Were you in my office in August 1902? A. Yes.

Q. At the time of the filing of the suit of Hutchins *v.* Munn? A. I was.

Q. What connection did you have with that case? A. Well, when the bill was filed I was consulted by Mr. Lipscomb and Mr.
80 Hill in regard to the temporary injunction which had been served upon them, and I appeared for them and filed answer for them.

Q. When were the answers filed? A. The answer was filed on the 27th day of August, 1902. I also at that time filed a motion to dissolve the injunction and to discharge the rule.

Q. Before whom did that motion come? A. The motion came on for hearing before Mr. Justice Anderson.

Q. Was it argued? A. Yes, it was argued by counsel on both sides.

Q. With what result? A. We argued the matter for a day before the court, and the court took it under advisement. He sent for me several days later, I think three or four days, and then stated that he would not dispose of the matter at that time but that he preferred to wait until the answer of the defendant, Munn, was filed. They were in Europe at the time and of course it was impossible for me to get their answer to file when I filed the answer of the other defendants. The court said he preferred to wait until their answer was filed.

Q. Where was I at that time, do you recollect? A. You were in Europe.

Cross-examination.

By Mr. BRANDENBURG:

Q. You were associated with Mr. Maddox, I believe, were you not? A. I was.

Q. And as a matter of fact did you not appear on behalf
81 of the Munns with Mr. Maddox in the preliminary hearing? A. The answer that I filed and all the papers I filed were signed by Mr. Maddox and myself as attorneys for the defendants. As a matter of fact Mr. Maddox was in Europe and knew nothing about it. I did not file an answer for the Munns as they were in Europe at the time, but I appeared.

By Mr. MADDOX:

Q. You entered your appearance for the defendants? A. I did.

By Mr. BRANDENBURG:

Q. And you entered your appearance, did you not, for the defendants, Munn? A. I don't think that I formally entered an appearance for the defendants, Munn. The answer that I filed was signed by Mr. Maddox and myself, and I also filed at that time an affidavit wherein I set forth that I was one of the attorneys of record for the defendants in this cause.

Q. Can you state when Judge Anderson took any action upon your motion? A. The only action that Judge Anderson took on my motion was to sit there and listen to the arguments of counsel on the 21st of August, when the motion was set for hearing and then send for me three days later, when he said he would not dispose of the matter until the answer of the defendants, Munn was filed.

Adjourned to meet on Friday, July 8th, 1904, at 10 o'clock A. M.

82 JULY 12TH, 1904—11 o'clock a. m.

Met pursuant to adjournment last noted.
Present: Same counsel, whereupon

JAMES G. HILL being first duly sworn, testified as follows:

Direct examination.

By Mr. MADDOX:

Q. Please state your residence and occupation? A. My residence is Washington, D. C.; occupation, architect.

Q. How long have you been an architect? A. I have been in practice here for twenty-five years. I have been an architect for forty years.

Q. Were you acquainted with the late Charles A. Munn? A. I was.

Q. Were you ever employed by him as architect in respect of his residence corner of 16th and Massachusetts Avenue? A. Yes.

Q. What changes, if any, did you make at his request as architect

of that building subsequent to the time of its purchase by him? A. I made half a dozen changes at different times.

Q. Of what did they consist? A. Remodeling the interior on two separate occasions, additions of a porte cochere, side en-
83 trance on 16th street, conservatory, a gallery, a ball room and a three-story addition in front.

Q. On the west side of the house that was next to Stilson Hutchins' house? A. On the west side of the house.

Q. What was the cost of those several changes and additions, made by you, in the aggregate? A. I can not say definitely now. Somewhere between thirty and forty thousand dollars in the aggregate.

Mr. BRANDENBURG: I object to this. This is all irrelevant and immaterial as to these other additions made by the architect.

The AUDITOR: I allowed testimony or proof on this line before and I think I will have to let this in.

Mr. BRANDENBURG: I note an exception.

Q. You were employed by Mr. Munn, you say, to make the last addition on the west of the house, the Massachusetts Avenue front? A. Yes.

Q. Do you remember when that addition was begun? A. In the summer of 1902.

Q. And it was stopped by an injunction, wasn't it? A. It was.

Q. And that injunction was issued on the 14th day of August, and dissolved on the 21st day of November. Of course in the interval no work was done on that addition proper? A. No work was done on that addition.

Q. The work was then taken up on the dissolution of the
84 injunction, was it? A. It was.

Q. What progress was made with it thereafter? A. Well, reasonable progress. The progress was much interfered with by cold weather that came on.

Q. Do you remember when it was finished? A. It was finished along in the spring, towards summer, the following year, 1903.

Q. It is not as practicable, is it, to do the work in the winter months as in the fall—the building construction? A. Not general building operations, no sir.

Q. Such as this was? A. No.

Q. Did you remove any portion of the main house during the building operation? A. Yes, sir.

Q. What portion? A. I took out the north and west walls of the back parlor and removed the bay window which opened into the front parlor.

Q. That is on the west side of the building as it was before the addition was begun? A. Yes.

Q. In what position did that leave the main house, comparatively habitable or otherwise? A. Uninhabitable during building operations.

Q. I suppose your work was delayed as architect by reason of this injunction? A. Yes.

85 Q. What additional charge, if any, did you make to Mr. Munn because of the additional work devolving on you by reason of the delay on account of the injunction order? A. I added one per cent. to the amount I intended to charge.

Q. What was the total cost of that addition? A. I placed my estimate on $10,000, expenses. I charged him $700.

Q. Instead of $600. A. Instead of $600.

Q. What additional work did you have to do? A. It dragged through a longer time and entailed a great many more visits to the house, and also additional work in preparing diagrams and information in regard to the case.

Q. In regard to the equity suit, you mean? A. In regard to the suit, yes.

Q. Was that additional cost paid you by Mr. Munn? A. I reckoned that in my calculation.

Q. I say, was it paid you? A. Yes.

Cross-examination.

By Mr. BRANDENBURG:

Q. This addition was made on the west of the main property. What other improvements were being made in the house? A. None that I know of.

Q. None except that little areaway? A. The ball room was
86 being considered and that three story addition.

Q. What did you mean when you said there was no work done on the front addition at that time? A. I mean that there was some work prosecuted after that in the ball room. It was not interfered with by the injunction.

Q. In other words, there was work being done during the time of the injunction in the ball room which was not covered by the injunction. That is correct, is it not? A. Yes.

Q. How extensive was that work, Mr. Hill. A. Well, not extensive; it was only a one story addition.

Q. A one-story addition? A. Yes.

Q. And what did you have to do in order to make that addition? Did you have to tear out any walls from the inside? A. The walls were torn out before the injunction was——

Q. That is, the inside walls? A. No, exterior walls. There were no interior walls removed.

—. Now, prior to the injunction as I understand you, all of the walls on the west were removed? A. No, only part of the west wall and part of the north wall. The northwest corner of the house was taken out.

—. Can you indicate on a little slip of paper, Mr. Hill,
87 what wall was taken out? A. (Witness making drawing.) This wall was taken out—these two walls there (indicating).

Q. Where is Massachusetts Avenue? A. Here is Massachusetts Avenue, and afterwards this was taken out (indicating).

Q. At the time of the injunction, which wall was taken out? A. I am under the impression that these were taken out at the time of

the injunction; at least they were taken out irrespective of the injunction, that is, from here to here (indicating).

By Mr. MADDOX:

Q. What do you mean by from here to here. A. The northwest corner.

By Mr. BRANDENBURG:

Q. Is that the Hutchins' property here (indicating)? A. That is the Hutchins' property here. This part here was not taken out at the time. That was removed later (indicating).

Q. That is an areaway? A. No, it was not an areaway because it was covered with a building up to that point (indicating).

Q. I want to see what point of the wall was taken out by you at the time the injunction was issued? A. Take it this way, that from the northwest corner of the main house the north wall was taken out to a distance of approximately twenty feet, and the west wall also.

88 By Mr. MADDOX:

Q. Of the Munn House? A. Of the Munn house. In other words the north and west walls of the back parlor were removed.

Q. And then you said a portion of the front part of the house? A. Then this bay-window was removed subsequently.

Q. What bay-window? A. The bay window of the west wall.

Q. The bay-window on the west side of the Munn house? A. Yes.

By Mr. BRANDENBURG:

Q. Was not the area on the northwest corner all covered under roof? A. Yes.

Q. So, then, the walls which you referred to as having been removed were interior walls? A. Well, yes, they were interior walls in that story, but exterior walls when you come above. They were part of the main walls of the house.

Q. And how far had they been removed? A. Only the first story.

Q. The top had not been affected at all? A. No. (Witness makes another drawing.) Walls "a" and "b" were removed either previous to the injunction or without regard to it.

89 Q. As you stated a moment ago they were interior walls and under cover? A. Yes.

Q. They were not exposed above the first story? A. No.

Q. The injunction applied only to the extension of the wall, did it not? A. Yes, from the point "c."

Q. So there was nothing to prevent the completion of that work back of the point marked "C"? A. Yes, there was.

Q. What was it? A. The second story of this front part marked d extended over—there was some complication in regard to the work in the front extension in connection with the back and also questions of the heating apparatus which could not be put in until the work was undertaken as a whole.

Q. In other words, you mean that the heating apparatus for the entire building could not be completed until the entire building was completed? A. Yes.

Q. But it was complete in itself so far as the other portion of the building was concerned, was it not? A. It could have been completed.

Q. There was nothing to prevent the completion of the—— A. Always with the exception of this joining, at end where it connected with the contemplated three-story building, it could not have been completed until the three-story building was built.

90 Q. Now, at the time the injunction was issued, did you remove walls "d" to "e"? A. They have never been removed.

Q. What walls were removed? A. The bay-window was removed.

Q. Was that removed at the time of the injunction? A. No.

Q. And what was this wall "e" "e?" A. That was simply glass.

Q. So then, as a matter of fact, none of the walls had been removed at the time the injunction was issued? A. None of these——

Q. None of the walls which were covered by the injunction? A. No.

Q. And the only work that had been done was on the interior and on the excavation for the foundation for the extension of the west wall? A. And the commencement of those walls.

Q. How far had you progressed with the work on this northwest room at the time of the injunction? A. I can not say. I can not connect it.

Q. Had it been commenced at all? A. Oh, yes.

Q. Have you any idea how far it had progressed? A. My impression is that we had removed the walls and put in the supports for the brick work above, but the work as I say proceeded without reference to the injunction except the work of making the connection here (indicating).

By Mr. MADDOX:

91 Q. What do you mean by "here?" A. That point to this point, "e" "e."

By Mr. BRANDENBURG:

Q. The entrance is at "f?" A. There is one entrance there.

Q. Where is the other entrance? A. At "g."

Q. Now, this room "H" had not been interfered with by you, had it? A. At the time of the injunction?

Q. Yes. A. No.

Q. Now, as a matter of fact, Mr. Hill, could not the contract for the building have been completed with the exception of the extension of the west wall and the bay-window in the front marked "J?" A. No.

Q. Why? A. Without entailing considerable extra work. We could not finish these things on account of running the pipes down

from work contained in the front extension, nor heating pipes. In other words we could not finish any of the work without the front.

Q. Now, Mr. Hill, you were only enjoined from building the west wall, were you not? A. I don't know what the injunction was.

Q. Nothing would have prevented you if you had wanted, from building in your pipes in that west area, would there have been? A. Oh, yes.

92 Q. What was it? A. You could not put the pipes in until we got the fixtures. We could not put in the fixtures until we built the building.

Q. What pipes do you refer to? A. I refer to the plumbing pipes and also the heating pipes.

Q. Now, Mr. Hill, as a matter of fact, it is more of a convenience to have the entire building completed in order to put in these plumbing pipes, is it not, instead of actual necessity? A. No, it is an actual necessity.

Q. Do you recall when you built up the interior walls there? A. They were not built. They were taken out and remained out.

Q. So that the fact that an injunction was issued restraining the erection of the west wall, did not interfere with that room at all? A. Yes. I could not finish the room on account of this end which adjoins the other building (indicating).

Q. The end "e" "e?" A. Yes.

Q. When this injunction was issued, can you state whether or not there was any portion of the interior exposed to the elements from the outside, and if so, what? A. I don't think there was any.

Q. You don't think there was any? A. At any rate, not to do any damage.

Q. Mr. Hill, as an architect, of course we may consider you an expert in connection with buildings in general? I suppose

93 you had experience sufficient for that purpose. A. I have had forty years' experience.

Q. Now, I will ask you what is the practice in winter in reference to brick work? Do builders ordinarily suspend during the winter? A. They do when it gets to be very cold.

Q. What do you mean by very cold? A. I mean as cold as it was during this winter there when I would not let them proceed with the brick work if they wanted to. The brick work was stopped on account of cold weather.

Q. What temperature would you say would be injurious to brick work? A. Well, I think when it gets down below twenty.

Q. And brick work may be—— A. It possibly depends on the location. In an exposed location I would not want to go much below freezing.

Q. In a place such as this with a southern exposure you would not permit it to be built below a temperature of twenty degrees? A. No.

Q. Suppose the temperature should occasionally run down below twenty, what would you say?

Objection.

(Discussion.)

The AUDITOR: Ask him if he has any arbitrary rule in reference to it.

Q. Have you any arbitrary rule? A. I have not.

The AUDITOR: An architect of a building is not confined in his discretion to four or five degrees of temperature.

94 Mr. BRANDENBURG: I desire to ask him some questions as to temperature.

Mr. MADDOX: I object. He is not required to give his expert opinion.

The AUDITOR: The objection as to the last question shall be sustained. In sustaining the objection I would allow him to state if he had an arbitrary rule on the subject.

Mr. MADDOX: He asked that question and he stated no.

Mr. BRANDENBURG: Then I desire to note an exception. Now, I desire to ask one or two questions and if not allowed to have an exception to them on the record.

Q. Mr. Hill, would you consider it safe as an architect to permit a wall to be erected in the winter although the temperature occasionally falls below twenty or twenty-five above zero, or even as much as freezing point? A. Yes, provided, they don't lay the brick in extremely cold weather.

Q. You would consider it safe? A. Yes.

Q. After these walls had been erected was there anything to interfere with the completion of the interior work? A. Yes, we could not go on with the plastering.

Q. What was the reason? A. The cold weather had arrived and the heating apparatus was not completed.

Q. Is there any apparatus that can be used for heating

95 purposes? A. Yes, but they are apt to discolor the wall.

Mr. MADDOX: You mean this thing called a salamander?

The WITNESS: Yes.

Q. What is a salamander? A. A salamander is simply a hollow cylinder in which they use coke on top and they set them around through the house. It can be done, but it is not as good practice as to have the natural drying.

Q. And as a matter of fact a salamander answers every purpose, does it not?

Mr. MADDOX: Except to discolor the walls?

Q. I would like to have you define their purpose in reference to the drying out of the plaster. A. It dries out plaster but it does not do it as well as a natural drying.

Q. Is not that the customary method pursued in structures put up in the winter? A. Where they have no other means of heating, yes.

Q. Was it not possible to turn on the steam in the main building? A. No.

Q. Why? A. There was no apparatus in that portion of the house.

Q. Would it not have been a very inexpensive thing to have put up a steam heater in this addition? A. The contract was made for heating but they could not put it in until the building was completed.

Q. My question is whether or not it was not possible to
96 have run in a radiator in this condition? A. There was no steam apparatus in the main house. They had nothing but hot air furnaces, and it was not possible to heat that from the existing furnaces. The steam apparatus was put in subsequently under these contracts.

Q. How do you account for the additional expense you say you went to, Mr. Hill? You were engaged in other work at the time, were you not? A. Yes.

Q. How did you count up that your services were worth this additional amount? A. I had to devote more time to the work than I would if it had gone along in the usual way.

Q. Have you any idea of the number of men that were actually employed on that work after it commenced? A. No.

Q. How often were you on this work, Mr. Hill? A. I had no regular time. When it was first commenced I went out every day. As it went along I was not out sometimes for a number of days, and when it got to a later stage I would only go up there at considerably longer intervals.

Q. Do you remember how many bricklayers were at work employed upon this work? A. I never knew.

Q. Or the number of carpenters or plasterers? A. No.

Q. Now, you stated that additional work resulted from the preparing of the diagrams? A. That is the additional work of myself. When the injunction was issued, it became necessary to take measurements of the walls as commenced and to make dia-
97 grams of them for presentation. This was done at Mr. Maddox's request.

Mr. MADDOX: Mr. Gatley's. I was not here.

A. (continued). It entailed a much greater length of service, because while the rear work was going on I had to go there and attend to that, when, if the front had been going on at the same time, one visit would have served for the whole purpose, and I had to divide it up into two parts, first for the rear and subsequently for the other.

Q. When was the rear finally completed? A. It was finally completed altogether with the front.

Mr. BRANDENBURG: I offer in evidence the plat made by the witness as Exhibit "Hill."

Adjourned.

HUTCHINS
*vs.*
MUNN.

WEDNESDAY, *November* 9, 1904—10.30 a. m.

Hearing pursuant to notice.

Present: Messrs. Brandenburg and Mad-ox.

Mr. MADDOX: I desire to state that my case is submitted except claims for counsel fees in connection with the suing out of the restraining order.

For the case in the Equity Court I charge a fee of $500 and for preparation of the brief here and the case of appeal by Mr. Hutchins in our Court of Appeals $250.

Mr. Gatley representing Messrs. Hill and Lipscomb will make a small charge of fees in the preparation of their answers
98 during the absence of Mr. Munn and myself in Europe.

Mr. BRANDENBURG: Counsel for the complainants object to the statement relating to counsel fee for the reason that this is not an item that is properly allowable.

(By Mr. BRANDENBURG:)

Q. Is not Mr. Gatley associated with you? A. No. Mr. Gatley left the clerk's office and came into mine two or three years ago but he is no way connected with my business.

Q. Does he receive a salary from you? A. I pay him a little annual retainer for which he has certain designated duties to perform but his business and mine are entirely independent.

Q. Are not Messrs. Hill and Lipscomb your clients? A. Never.

Q. Didn't they come to your office because of the fact that you represented Mrs. Munn? A. I really don't know, I was not here at all, I only know that while I was away I had a letter from Mr. Gatley in which he said he had been approached by Messrs. Hill and Lipscomb and that he had prepared or would prepare answers to the suit of Mr. Hutchins and expected to get a discharge of the restraining order on their answers.

Mr. BRANDENBURG: I have no more questions to ask.

Adjourned to Wednesday, November 23, 1904, 10.30 a. m.

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HUTCHINS
*vs.*
MUNN.

WEDNESDAY, *November* 30, 1904—10.30 a. m.

Hearing pursuant to notice.

Present: Mr. Brandenburg and Mr. Maddox and Mr. Gatley.

Mr. MADDOX: I file a statement of the claim of Mrs. Munn.

Mr. BRANDENBURG: I ask that counsel be required to specify more in detail the damage to the furniture and house No. 1601 Massachusetts Avenue, as the testimony of Mrs. Munn in this regard is very general.

Mr. MADDOX: I am not able to furnish in any more detail any explanation of the bill of particulars with regard to the item of $1500 claimed as damage to the furniture.

Mr. GRANT LEET is duly sworn and testifies as follows:

By Mr. BRANDENBURG:

Q. What is your occupation? A. Photographer.

Q. How long have you been engaged in that business? A. Twelve years.

Q. Have you been accustomed to making photographs for use in Court proceedings? A. Yes.

Q. Do you recognize these photographs? A. I do.

Q. Will you kindly state what they are and whether you
100 took those photographs? A. I made these photographs of Mr. Stilson Hutchins' house and part of the adjoining house they were made on August 25, 1902, both of them made the same day, I have written on the back.

Q. The adjoining house is the Munn house? A. On the corner of Massachusetts Avenue and 16th street.

Mr. BRANDENBURG: I desire to introduce those two photographs in evidence.

By Mr. MADDOX:

Q. Had any work been done then to the Munn house when these photographs were taken?

Mr. BRANDENBURG: I object as the photographs will show for themselves.

Mr. MADDOX: Counsel stated that these photographs were offered in evidence to show the condition of the two houses at the time the injunction was taken out, I notice that the photographs were taken on the 25th of August and the injunction or temporary restraining order was issued on the 14th.

Mr. BRANDENBURG: I made an error if I stated that, I meant to say that they show the condition of the work on the day on which they were taken.

The AUDITOR: The witness may answer the question.

Question is repeated by stenographer.

A. Well, I don't know.

Q. I notice in the rear view of photograph No. 2 what seems to be a board with a ladder against it what does that indicate? A. I don't know.

101 Q. What are those boards shown in the picture? A. They are boards.

Q. Where were they? A. Apparently between Mr. Hutchins' house and Mr. Munn's house.

Q. Have anything to do with either house? A. Seem to.

Mr. BRANDENBURG: I object to this, as this witness is not competent to testify regarding this matter.

Q. Still calling your attention to No. 2 underneath those boards there is a very dark spot, do you know what that indicates? A. An opening between the Munn house and the Hutchins house, I suppose.

Mr. BRANDENBURG: I object and move to strike out the answer on the ground that it is merely supposition on the part of the witness, he has answered that he supposes it is an opening.

The AUDITOR: The objection is overruled.

Q. You don't know whether that is an opening underneath the Munn house? A. I do not.

Q. Calling your attention to No. 1 along the edge of the Hutchins house there seems to be a wall projecting a little out of the ground, do you recollect whether that was a foundation of the improvements in progress on the Munn house? A. That is what I understand it to be.

Mr. BRANDENBURG: I will admit that that is the foundation wall.

102 Q. How far was that above the surface of the ground? A. Well this photograph does not show the surface of the ground.

Q. There seems to be in your photograph No. 1 steps in front of the circular window of the Hutchins house, are they steps? A. I think that is two parts of the foundation wall of those improvements, they look to me to be so.

Q. How far did that foundation wall run. A. I can bring an estimate of that.

Q. With regard to the front of the Hutchins house. A. Probably from eight to ten feet.

Q. And the top of the foundation wall is about a foot below the surface of the earth in front of the bay window of the Hutchins house.

Mr. BRANDENBURG: I object to this line of examination.

Discussion.

The AUDITOR: The objection is overruled.

A. In my judgment the part of the wall is about a foot below the surface of the ground in front of the bay window of the Hutchins house.

Q. Can you tell from an examination of the photographs or from any independent recollection how far the boarded place is from the front of the bay window of the Hutchins house? A. I should judge it was in the neighborhood of five feet from the photograph, five feet from the front of the bay window or the part of the bay window nearest Massachusetts Avenue.

103 Q. From what point were those photographs taken? A. Photograph No. 1 was taken from almost directly in front of the boarded place near the center of the picture a little bit to the east of the center and photograph No. 2 was made near the center and a little bit to the west but not quite so far to the west of the center as photograph 1 is to the east of the center.

By Mr. BRANDENBURG:

Q. Your statements with reference to the distances are merely suppositions on your part? A. I took no measurements, I am judging from the photograph.

Mr. ERWIN C. BRAINERD having been sworn testified as follows:

By Mr. BRANDENBURG:

Q. What is your business? A. Real estate broker.

Q. How long have you been in that business? A. Ten years.

Q. Are you acquainted with, in a general way, with the house at the corner of 16th and Massachusetts Avenue? A. Yes.

Q. Are you acquainted generally with houses in that neighborhood? A. Yes.

Q. Are you acquainted with 1601 Massachusetts Avenue? A. Yes.

Q. Have you been in that house? A. Yes.

104 Q. Are you familiar with house 1603 Massachusetts Avenue the house belonging to Mr. Hutchins? A. Yes.

Q. Have you been in that house? A. Yes.

Q. What would you say about those two houses comparing them with reference to the rental value?

Mr. MADDOX: I object.

A. I don't see how it is possible to answer that question, as they were or as they are now, do you mean?

Q. As they are now? A. Well I should say without knowing how the Munn House is furnished, because I have never gone upstairs, I know the Hutchins house, have seen it recently with the addition of the ball room but assuming that the Munn house is furnished as elegantly, of course the tenant, on account of the ball room or art gallery in the Hutchins house would be willing to pay as much for one as for the other, as the Munn house has no gallery or ball room, but is on the corner with a cheerful outlook some one might possibly prefer that.

Q. The Hutchins house has a side light on an alley? A. Yes it has a side light.

Q. Have you got the Hutchins house for rent? A. Yes.

Q. What is the fair rental value of that property.

Mr. MADDOX: I object.

The AUDITOR: The objection is sustained.

Q. What would you say would be a fair rental value of the Munn house based upon your knowledge of the property in that neighborhood if you know, per annum? A. Answering that ques-

105 tion, I can only compare it with similar houses and prices actually obtained, assuming that the house is elegantly furnished, I should say that the Munn house should bring $6,000 per annum. I have a better house the Alger house rented for $6,000, the Alger house was formerly known as the Gurley house, of course the rent obtained for a furnished house depends upon the furniture. I leased the Saks house to Secretary Gage a twenty-five foot front it was, for $4,500 per annum that was on account of the numerous quantities of expensive and elaborate furniture, there is some $25,000 worth of furniture in that house, that is whey we obtained such a big rent.

Q. Where a house is rented for a season do you receive the same amount of rent as that if it rents for the year? A. No.

By Mr. MADDOX:

Q. What do you mean by a season? A. Three or four months.

Q. You don't mean then from November to May? A. No, I only go by what I have done, I can't do more.

Q. What house have you rented for more than three or four months. A. J. Fairfield Carpenter's next to the Mackey-Smith house.

Q. For how long a time did you rent that? A. Six months.

106 Q. Where were the owners? A. In Berlin.

Q. The house was idle the rest of the year? A. Yes.

Q. You simply did the best you could with it? A. Yes.

Q. Do you know the Bates house? A. Yes.

Q. Where is it? A. 18th and N streets.

Q. How does it compare with the Munn house? A. A very much larger house.

Q. How does it compare in desirability of location? A. Equal.

Q. Being opposite to the Church of the Covenant and its bells, and the gathering — the crowds that are constantly there? A. Well I should say equal.

Q. How much larger is the Bates house? A. I have not taken any measurement, but judging from the exterior it seems to be that the Bates house must be about 70 feet square.

Q. The Munn house is 66 feet on Massachusetts Avenue. A. As it is at present, yes.

Q. Are you testifying with reference to the rental value of the Munn house as it was when you knew it or as it is now? A. Yes, my recollection of the house was the main floor I have not been in the house since putting the addition on, I haven't an idea what it looks like now.

Q. Then your comparison of the Munn house has been

107 of the house without the improvements? A. Yes, that is the way I have been answering, I would not be able to give an accurate and intelligent answer as to the Munn house now without seeing the interior as it is now.

Q. Was it in the old days, before the addition that you saw it. A. Yes, then only the main floor.

Q. Would you consider the location of the Munn house more desirable for residence purposes and likely to be more desired for that purpose than the Hutchins house? A. Yes.

Q. It is certainly more desirable than the Alger house taking into consideration only its location? A. I should say yes.

Q. Is not the location of the Munn house considered to be one of the finest in the City? A. Yes.

Q. Now this Saks house which you say is furnished with $25,000 worth of furniture and which you rented for $4,500 where is that? A. One block west of the Munn house, 1715 Massachusetts Avenue.

Q. It is a small house isn't it? A. Yes, it is a small house.

Q. Do you know what the Bates house rents for? A. Only from hearsay.

Q. You don't know? A. No.

Q. Do you know the Barney house on Massachusetts

108 Avenue. A. Yes.

Q. Do you know the interior? A. Yes.

Q. What does it rent for now? A. I don't know now.

Q. Do you know the Morgan house? A. Yes.

Q. Where is that? A. Northeast of 16th and Scott Circle.
Q. Who occupies it? A. Burton Harrison.
Q. What does it rent for? A. $13,000.
Q. How much if any, is it larger than the Munn house? A. Well I should say double the size.
Q. Then your predicate of the rental value of the Munn house as being $6,000 per annum is that the Morgan house across the circle is double the size and rents for $13,000? A. The Morgan house has $80,000 worth of furniture and a very fine ball room?
Q. If the Munn house had a ball room would you consider that it would add to the rental value? A. I should.
Q. How much? A. Three or four thousand dollars.
Q. People seem to like ball rooms? A. They do.
Q. You don't know the rental value of the Barney house?
109 A. Not at present, I had it for rent.
Q. You stated that Mr. Hutchins' house has a side light on an alley, do you consider that as desirable as a side light on 16th street? A. No.
Q. How long ago was it that you examined the Munn house? A. When Mr. Windom owned it.
Q. Did Mr. Munn buy Mr. Windom's furniture? A. I don't know.
Q. You don't know anything at all of the character of the furnishings of the Munn house? A. Nothing.
Q. Your estimate of the rental value is made up from the knowledge you acquired by reason of the examination during its ownership by Mr. Windom? A. And exterior views.
Q. As it then existed? A. It seems to me that I answered that question, now, as it exists now.
Q. Do you know what Mrs. Munn paid for that house? A. I heard.
Q. What did you hear? A. $70,000, that is hearsay.
Q. Do you know to what extent she has improved it and the cost of the improvements? A. No.

By Mr. BRANDENBURG:

Q. Have you seen the improvements made by Mrs. Munn? A. The addition, yes.
110 Q. Now, bearing in mind the addition to the Munn property what would you say was a fair rental value presuming that the house was elegantly furnished? A. It is very difficult to answer that question, I can only say that in my opinion by comparison with the Alger house that it should bring about $6,000 per annum.

Mr. BEN B. BRADFORD having been sworn testified as follows:

By Mr. BRANDENBURG:

Q. What is your occupation? A. Real estate broker.
Q. How long have you been engaged in that business? A. Twenty years.

Q. Have you any profession? A. I am an architect by profession, but have given it up.

Q. For how many years were you an architect? A. Fifteen years.

Q. Do you at present design any buildings? A. Occasionally for myself.

Q. Have you been in the Munn house? A. I have, yes.

Q. Frequently? A. I was in it when Mr. Windom owned it and I have been in it since Mr. Munn owned it.

Q. Were you in it do you recollect at the time the injunction was sued out in this court? A. I was.

Q. Do you know the condition of its furnishings? A.
111 I do.

Q. Will you state according to your best judgment what would be a fair rental value of it? A. I consider $6,000 a good rental value.

Mr. MADDOX: I object to that as this witness has not qualified himself sufficiently to give an opinion on that subject.

Q. Have you rented any property in the City of Washington in that neighborhood? A. I have never made a specialty of renting.

Q. Have you a general knowledge of rental values in that neighborhood? A. I think so, yes.

Mr. MADDOX: I object to this line of questioning as this witness has not qualified.

Q. Have you rented any houses in that neighborhood? A. Not recently, I have property for rent there, but I really don't try to rent it.

Q. From the knowledge you have of rental values in that neighborhood and from your knowledge of the Munn property what would you say was the fair rental value of that house?

Mr. MADDOX: I object as he has not qualified to testify on this point.

Q. As a bare house, without furniture? A. I think about $350 a month, I want to explain why I am putting the rent at that price, the parlor is lighted by a sky-light and it has a few windows on the north which overlook Mr. Hutchins' roof, the roof over the kitchen which is undoubtedly an objection to that property, I know the way the house is planned, I knew it before it was furnished, it is just
like you would look out on that wall (indicating the side of
112 the room).

Q. Did you examine these improvemer at the time of the injunction on August 14th? A. I don't remember the date, but I took breakfast with Mr. Hutchins one morning they had then dug out for the foundation wall and we went out and looked at what they were doing, and I said to Mr. Hutchins——

Mr. MADDOX: I object.

A. The foundation wall was dug out and the concrete had been put in and the brick wall was three or four feet high.

Q. I hand you two photographs that were taken on the 25th of

August or nine days after the injunction and I will ask you whether or not the property was enclosed if you recollect? A. The property was inclosed from the time I saw it, whatever the date was, I don't remember the date.

Q. When you saw it was the work in progress? A. They were not working on it.

Q. Do you recollect prior to the injunction? A. Yes.

Q. You said that the Munn house was enclosed as appears in the photographs? A. Yes.

Q. Are you familiar with the improvements which Mrs. Munn made to her house? A. Well, I am with the addition.

Q. I am referring to the improvements that were enjoined in this case? A. I am.

113 By Mr. MADDOX:

Q. You say you took breakfast with Mr. Hutchins and that the men were not at work? A. No.

Q. Was that a late breakfast? A. Mr. Hutchins takes breakfast up to one and two o'clock, that happened to be about ten o'clock in the morning.

Q. Your relations with the Hutchins have been very intimate for several years. A. Yes.

Q. You went on his injunction bond in this case? A. Yes.

By Mr. BRANDENBURG:

Q. Do you rent his property now? A. No.

Q. With your knowledge of the improvements which were being put and contemplated by Mrs. Munn how much time would you say it would take to complete that work from the beginning to the end? A. I would guarantee to do it in three months.

Q. You mean to say you could have done the entire work? A. To that addition, yes.

Q. Is it customary for the builders in the City of Washington to erect brick building and do plastering in the winter months? A. I am building a house now for myself and intend to go right on with the work right through the winter months, yes it is cus-

114 tomary.

Q. I show you a weather report introduced by counsel for Mrs. Munn covering the period from the 23d of November through to the 25th of March and ask you whether or not on any date during that period the temperature was too low to proceed with either the erection of the brick work or do plastering in that house? A. If a good cement was added to the mortar there is no reason why the work should not have proceeded, mortar will set in eight hours.

Q. How long should it have taken for the completion of the brick work in that addition after the injunction was dissolved on the 21st of November? A. It should have been done in six weeks.

Q. From that weather report was there any time when it would have been necessary to use cement in order to erect the brick work? A. I think it would have been a precaution to have it, good mortar ought to always have cement in it any way.

Q. After the house was roofed in should there have been any difficulty in plastering and completing the work? A. I see no reason, there was steam heat in the building.

Q. Outside of steam heat, was there any other way? A. By the use of Salamander.

Q. Is that a satisfactory heat, so far as you know? A. Yes, it is used right through the winter in the north, in New York.

Q. Would the temperature interfere with the carpenters' work at all? A. Not in the slightest.

115 Q. I will ask you whether or not it is the custom for architects to charge anything additional where there is a delay in the completion of a building such as this, if you know? A. None that I know of.

Q. Can you state whether it would have been possible for the Munns to have lived in this house to have used the house outside of the portions adjoining the improvements.

Mr. MADDOX: It is admitted that they could have lived in there, in some portions of the house.

Q. Do you recollect whether you were on this work at any time after the injunction was dissolved? A. I went over the work with Mr. Lipscomb at his suggestion but I don't know whether it had been dissolved or not it may have been during the injunction or afterwards.

By Mr. MADDOX:

Q. You say that that work ought to have been done in three months? A. Undoubtedly, I could have finished it in three months.

Q. Ready for occupancy in three months? A. Why most assuredly.

Q. Mr. Lipscomb is a pretty good contractor, isn't he, he is considered competent isn't he? A. Yes, he is undoubtedly, but he was interfered with from start to finish.

Q. By whom? A. Mr. and Mrs. Munn, time and again, I was told so by Mr. Lipscomb.

116 Q. Did he tell you how he was interfered with? A. He said he was sorry, he had undertaken the work he begged Mr. Munn not to make the improvement, and Mr. Hill begged him not to make the improvements he has simply ruined his house and ruined Mr. Hutchins' house as well.

Q. Did Mr. Munn interfere with the progress of the work in that way? A. I could not say.

Q. Did you ever see him on the ground? A. I never saw Mr. Munn on the ground.

Q. He interfered with Mr. Lipscomb? A. He was constantly writing to Mr. Hill and Mr. Hill would give instruction to Mr. Lipscomb to do this and that.

Q. Those were the causes of the delays on the improvements? A. Yes.

Q. Was that what Mr. Lipscomb told you? A. Yes.

Q. You think it would be advisable to attempt to do brick work when the thermometer stands at ten or eleven above? A. As I said

Mr. Maddox there is no reason why they should not have gone on with the brick work if they had used cement in the mortar.

Q. That would have added a little expense to the work? A. A barrel of cement would go a great ways in that it costs but four dollars a barrel and it would only take about three or four barrels to do all the work, and it ought to have cement in it any way.

117 Q. Suppose the temperature indicated nine degrees above zero, would you still do brick work? A. On a southern exposure where the sun shines, yes.

Q. Can work be done as well in cold weather as during the summer and fall months? A. Probably not as fast.

Q. Why not? A. The men will stop to warm their hands, of course they are not as quick as they are in summer.

Q. Is it the custom to use salamander in Washington in houses where the people are particular about the finish? A. There is no reason why they should not, I have seen it used in the best houses.

Q. Doesn't it slightly discolor the plaster? A. Not at all, only have to keep up a good fire.

Adjourned to Tuesday, December 6, 1904, at 10.30 a. m.

HUTCHINS
*vs.*
MUNN.

TUESDAY, *December* 6, 1904—10.30 a. m.

Hearing pursuant to adjournment.

Present: Messrs. Maddox, Gatley and Brandenburg.

Based on the non-appearance of Mr. Brandenburg's witnesses, the hearing is continued to Wednesday, December 7th, 1904, at 10:30 o'clock.

118 HUTCHINS
*vs.*
MUNN.

SATURDAY, *December* 24, 1904—10 a. m.

Hearing pursuant to adjournment.

Present: Messrs. Maddox, Gatley and Brandenburg.

Mr. JAMES HUGHES having been sworn testified as follows:

By Mr. BRANDENBURG:

Q. What is your occupation? A. Contractor for brick work.

Q. How long have you been a contractor? A. Since 1875.

Q. During that time please state how extensively you have been occupied in the business you have just referred to? A. Well I suppose I have built four public buildings, that in the District, I built the K street market house in 1881 the first public building that I built was the 12th street Station House and the Truck House, Truck C.

Q. I will ask you whether or not in the District of Columbia it is customary to stop brick laying in the winter months. A. Not to my knowledge.

Q. Have you done any brick work in the winter in the City of Washington? A. Yes. I built a house, I started it on the 15th of December and built the entire house and turned it over to the owner the first of May, that was in 1895.

119 Q. At what temperature did you say it was advisable to put up brick work? A. Below freezing point.

Q. Suppose that in the day time it rises to freezing point and at night falls as low as 20 above, what would you say? A. It would not hurt if you used fresh mortar and the bricks were dry.

Q. Do you know anything about plastering? A. Yes.

Q. I will ask you whether or not it is customany in the winter months in the City of Washington to do plastering? A. All the houses I have owned since I have been here four or five, and the house I am living in now was plastered in the winter.

Q. Can it be safely plastered in the winter? A. Certainly it can.

By Mr. MADDOX:

Q. How do you keep your plastering from freezing when the temperature is below freezing point? A. Simply have a little fire in the house.

Q. When the weather is very cold you mix your plaster in the house? A. Usually in the cellar.

Q. That is for brick work? A. Anything.

Q. Then you could not mix it in a box on the street as is usually done when the temperature was at zero. A. Why of course I mix it in the cellar then, Oh yes.

120 Q. Then building under those circumstances would not be practicable? A. I would not use the stuff that was frozen.

Q. How would you keep it from freezing. A. I would not use it, if the God Almighty freezes the stiff, I could not help it.

Q. Is this stuff, as you call it, liable to freeze when the temperature is anywhere below freezing point? A. Not if it is in the house.

Q. Suppose you are at work on a foundation wall there was no house, how would you then proceed? A. I could not prevent it.

Q. You would not proceed at all? A. Not if the weather was below freezing point.

Q. Is it not impossible to do brick work, when one day the mortar freezes and the next day it thaws out? A. I could not say that it was, because last winter I done a little over two thousand dollars' worth of work in January and February at Ft. Hunt under the supervision of the Army Officers over at Ft. Hunt.

Q. Where is Ft. Hunt? A. Virginia.

Q. Where? A. Across from Ft. Washington.

Q. Did you work continuously? A. Yes, I usually paid the men from $12 to $14 a week, and the laborers got about $5.

Q. Cold was it? A. It was very cold, some mornings I know I had to take my cap and pull it down over my ears.

121 Q. Was the temperature below freezing point? A. Yes, you remember last January and February was very cold

months but of course during the day the sun comes out and it moderates, when we would go to work.

Q. Was the building there outside walls? A. Putting cellars under the officers' quarters.

Q. Did you mix your mortar in the cellar along by the furnace? A. Mixed it in the cellar, there was no furnace there, there was a small whole I dug.

Q. How deep was the cellar? A. Seven feet.

Q. Below the ground. A. Five feet below, the house stood up about two feet from the ground.

Q. Had the officers been occupying this house? A. They were living there at the time.

Q. Was there a fire in the house? A. Upstairs.

Q. How do you plaster in the winter time when the temperature is below freezing point? A. Usually use, what is called Salamanders, about two feet wide and about two feet deep made of sheet iron.

Q. They are heating apparatus? A. Yes, something like that, you build a fire in it, but you have to open the windows to let the smoke out.

Q. Doesn't the use of Salamanders have a tendency to discolor the plaster? A. I don't know.

122 Q. Under those circumstances, when the temperature is below freezing point where do you mix plaster, inside the house? A. In the cellar.

Q. That would necessitate a fire in the cellar? A. No.

Q. In what kind of a cellar would plaster freeze at a temperature say 15 degrees below freezing point? A. It would not freeze.

Q. Plaster would freeze in a cellar at what temperature? A. I could not say.

By Mr. BRANDENBURG:

Q. You stated in response to a question of Mr. Maddox you would not proceed at all with building if the temperature was below freezing point, what did you mean by that, do I understand you clearly? A. I would not do any outside work that if I wanted to put up a wall here and it was the outside wall, I would not attempt, if it was below freezing.

Q. Supposing at night the temperature went below freezing and in the day time it went up, would that stop you from working? A. It would not.

Q. At Ft. Hunt, when you was on the work, was the temperature below freezing? A. Many nights, it was down low.

Q. Was the cellar open there at Ft. Hunt? A. Yes.

By Mr. MADDOX:

Q. What do you mean by the cellar being open? A. The

123 sides was open, it was not all built up, it would not be closed at night.

Mr. SNOWDEN ASHFORD having been sworn testified as follows:

By Mr. BRANDENBURG:

Q. You appear here under a subpœna? A. Yes.

Q. What office do you hold if any? A. Inspector of buiildings of the District of Columbia.

Q. As inspector of buildings what have you to do generally, if anything, with the erection of buildings in the District of Columbia? A. A private building I have to inspect them as often as possible to see whether the work complies with the regulations, in the public buildings I make frequent inspection of the work continually superintend it.

Q. As such inspector did either you or your assistant inspector inspect the work at 1601 Massachusetts Avenue in 1902? A. Yes.

Q. Were any reports made of such inspection? A. Yes.

Q. Are you the custodian of those reports? A. Yes.

Q. Have you the reports covering the period of the construction of this work from its commencement until its completion, laying aside the period covered by the injunction, that is between August 14th and the latter part of November. A. November 1902,

124 yes.

Q. I will ask you whether or not you have examined those reports.

Mr. BRANDENBURG: I propose to show by the records of the building inspector that on certain days when inspection was made there was no one at work upon the building or the improvements.

A. I have.

Q. I ask you whether or not any of these reports show that there was no work being done *any* any particular days, if so what days.

Mr. GATLEY: We object to the question.

Mr. BRANDENBURG: I desire to offer in evidence the reports of the inspector, to be hereafter produced.

Mr. MADDOX: I renew the objection as being incompetent immaterial and irelevant.

The AUDITOR: The objection is overruled subject to a motion to strike out the evidence hereafter.

Mr. BRANDENBURG: I withdraw that question.

Q. I will ask you whether you know if during the winter months work on the District buildings is stopped?

Mr. GATLEY: I object as incompetent and immaterial.

Q. (Continuing:) On account of the weather.

Discussion.

Mr. BRANDENBURG: I withdraw the question.

Q. I will ask you whether or not work on the public buildings is stopped because the temperature may fall below freezing point?

Messrs. GATLEY and MADDOX: We object to that for the same reason.

125 Q. I will make it brick work Mr. Auditor, brick work on the outside of the building. I will ask you whether or not in

this District, the walls of any of the District buildings are erected when the temperature is below freezing point?

Mr. GATLEY: I object.
The AUDITOR: The objection is sustained.

Q. Would you deem it safe to erect walls with the temperature below freezing point?

Mr. GATLEY: We object to that.
Mr. BRANDENBURG: I withdraw the question.

Adjourned: to Friday, December 30, 1904, 10:30 a. m.

HUTCHINS
*vs.*
MUNN.

FRIDAY, *December* 30, 1904—10:30 a. m.

Hearing pursuant to adjournment.
Present: Messrs. Maddox, Gatley and Brandenburg.

Mr. JOHN L. SMITHMEYER having been sworn testified as follows:

By Mr. BRANDENBURG:

Q. What is your profession? A. Architect.
Q. How long have you been an architect? A. Something in the neighborhood of forty-six or seven years.
126 Q. As such architect have you superintended the construction of any buildings, if so specify some? A. The Congressional Library, Georgetown College, Army and Navy Hospital, a number of private residences, Chamberlain's Hotel at Fortress Monroe.
Q. I will ask you whether or not you have examined the plans for the improvements to the Munn house? A. I have, sir, I had them in my possession for a little while.
Q. I will ask you whether or not you have seen the improvements to the house 1601 Massachusetts Avenue, N. W.? A. Yes, I went up there for the purpose of seeing them.
Q. From your experience as an architect how long would you say that it would take to construct the addition to the Munn house in accordance with the plans, presuming that reasonable diligence had been exercised.

Mr. MADDOX: I object to the question. May I be permitted to ask the witness a few questions?

Q. You say you examined the addition? A. I examined the plans.
Q. You saw the addition from the outside? A. Yes.
Q. Do you know anything about the finishing of it. A. No.
Q. You don't know how the inside of it is finished? A. I have not been on the inside of it.

Mr. MADDOX: I object.

The AUDITOR: The objection is overruled.
The stenographer repeats Mr. Brandenburg's last question.

127 A. Well if the building is erected on the inside and finished as it should be in accordance with the outside, not extra fine work but ordinary fine work, I should think that sixty days, at the outside seventy days, would furnish the addition.

Q. I will ask you whether or not from your knowledge of the erection of buildings whether buildings are erected in the City of Washington in the winter months where during the day the temperature rises to freezing or above and at the night time may possibly fall as low as twenty above zero? A. I am not very well posted on that subject, because I have always avoided, according to the old rule of architects and builders, to not do any work when the frost is on, but there are exceptions, when I built the Georgetown College. I did a great deal of brick work in the middle of winter by making the bricks hot and the mortar by steam, that is much more expensive, it is admitted. But lately I know that they are doing some cement work in the winter, which is new to me.

Q. I will ask you in your experience in building additions to houses whether or not it is usual to leave the furniture and hangings exposed in portions or parts of the house adjacent to the improvements during the progress of the work? A. Very unusual, I have never experiences that anywheres, there is the danger of destruction.

By Mr. MADDOX:

128 Q. Why did you do that Georgetown College work in the middle of the winter? A. It was required and necessary.

Q. They were in a great hurry? A. It was all finished except that part including the chimneys.

Q. What do you mean by using the words "required and necessary." A. It was required for protection and necessary to make fires, they could not make fires in a room without having a chimney.

Q. When the temperature is freezing is it advisable then to do outside brick work? A. I always avoided it as I stated, but there are instances where you have to do it and where it is to the interest of all parties to do it.

Mr. BEN B. BRADFORD is recalled.

By Mr. BRANDENBURG:

Q. I ask you whether or not you have within the past few weeks been engaged in erecting or doing any brick work in the City of Washington and if so whether or not during the progress of such work the temperature has fallen below freezing?

Mr. GATLEY: I object, as immaterial.
The AUDITOR: The objection is overruled.

A. I am engaged in building a house, a residence for myself, that is John McGreagor is doing the work and the coldest night we

have had, it was eighteen above, the next morning they laid brick, I am laying brick today and they set stone yesterday.

129 Q. Was the temperature below freezing this last day or two? A. We laid brick after it was eighteen above, that is the coldest night we have had.

By Mr. MADDOX:

Q. When was that? A. I don't remember the date, you said you wanted to know why I had stopped the brick work?

Mr. MADDOX: I move that that be stricken out.

Mr. BRANDENBURG: I have no objection to having it stricken out.

By Mr. MADDOX:

Q. You say the day after the temperature indicated eighteen degrees brick was laid on this private residence? A. Yes, cement work.

Q. What was the temperature the day the work was done? A. I don't know.

Q. What was the temperature three or four following days? A. I don't know.

Q. What was the outside temperature yesterday? A. I don't know they were working yesterday.

Q. The work they did yesterday was outside work? A. Yes.

Q. Walls. A. Yes.

Q. Done with cement mortar? A. Cement and lime put in, a little lime to warm the cement, I think it was freezing yesterday.

130 Mr. JOHN T. MEANY having been sworn testified as follows:

By Mr. BRANDENBURG:

Q. What is your business? A. I am engaged in real estate.

Q. How long have you been in such business? A. Practically all my life, actually engaged for twenty years.

Q. What position do you now hold? A. I am with the corporation of Stone and Fairfax.

Q. In what capacity? A. Secretary of the Company and have charge of the rental department for the corporation.

Q. You are familiar with houses in the neighborhood of 1601 Massachusetts Avenue? A. Well, yes, we have several houses in that section for rent.

Q. What in your opinion would be a fair rental value for the house 1601 Massachusetts Avenue, supposing such house to be elegantly furnished?

Mr. GATLEY: We object if the Court please.

The AUDITOR: The objection is sustained.

Q. Have you rented any furnished houses or do you have any furnished houses for rent? A. Yes, we have a great many.

Mr. BRANDENBURG: I renew my question.

Mr. GATLEY: I renew my objection.

The AUDITOR: The objection is overruled.

A. I should think that ho[illegible] was worth between five and six thousand a year, we have ho[illegible]es in that section for rent.

131 Mr. MADDOX: We have no cross-examination.

Mr. BRANDENBURG: I offer in evidence the following Certificates of Inspection from the office of the Building Inspector, copies of which are to be filed and the originals to be produced when called for.

Inspections were made of the Munn house July 26, 28, August 4, 8, 16, 19 and 21. From August 27, September 6, 18, October 2, 6, 16, 27, November 3, 14, 17, 24, on these dated between August 27 and November 24, there was no one working because it was the period covered by the injunction.

On December 2, 9, 15, 26, 30, January 5, 13, 19, 31, February 4, 9, 14, March 2, 12, 16, 24, April 3 and 28, inspection was made and on December 9, 26, February 9, 14, there was no one engaged upon the work at the time of the inspection.

Mr. GATELY: We object.

The AUDITOR: The ruling is reserved.

Mr. BRANDENBURG: I desire to introduce a copy of the application of Charles A. Munn acting as attorney for Carrie L. Munn for the erection of this addition on October 3, 1902 and the permit granted in accordance therewith dated October 3, 1902. This application shows that the cost of the proposed improvements is $3,000.

Mr. GATLEY: We object to that on the ground that it is immaterial and irrelevant and incompetent, and on the further ground that this paper seems to be altered.

Mr. BRANDENBURG: I introduce a copy of the original for the purposes of the case.

Adjourned to Friday, January 6, 1905, 10:30 a. m.

132 HUTCHINS
*vs.*
MUNN.

FRIDAY, *January* 6, 1905—10:30 a. m.

Hearing pursuant to adjournment.

Present: Messrs. Maddox, Gatley and Brandenburg.

The following stipulation is offered in evidence, signed by both counsel.

It is hereby stipulated and agreed by and between counsel to the above entitled cause, that Stilson Hutchins if called will testify that he is the complainant in the above entitled cause; that he has resided at No. 1603 Massachusetts Avenue, for the past fifteen years or more; with the exception of a short period when it was rented; that he is the owner of said property and that Carrie L. Munn is the owner of house No. 1601 Massachusetts Avenue, and has resided therein with her family since the time of its purchase, except for such portions of the years as she was abroad or elsewhere; that she has never had said house to rent so far as affiant knows

since the time of its purchase; that there had never been any signs or notices for rent during all of such period, upon said property and that he never heard that said Carrie L. Munn had said house for rent; that said Hutchins some years ago rented his said house No. 1603 Massachusetts Avenue fully furnished, with ball room and art gallery, with all pictures, for the sum of $4500 per annum; that before the injunction sued out by said Hutchins and after the discharge of said injunction, said Hutchins on a number of occasions, the exact number he can not state, and during the period of construction noted that there was no one at work upon said addition to the Munn house.

133 Subject nevertheless to the competency of the evidence touching the rental received for witness's house.

SAM'L MADDOX,
*Solicitor for Carrie L. Munn.*
BRANDENBURG & BRANDENBURG,
*Solicitors for Stilson Hutchins.*

Dec. 10, '04.

Mr. MADDOX: I object, that testimony of the complainant in the bill, Stilson Hutchins, if he had been called as a witness testifying as set out in the stipulation of counsel, was not competent to prove or disprove any issue between himself and the defendant Carrie L. Munn.

Mr. BRANDENBURG: I announce my case as closed.

Mr. WILLIAM P. LIPSCOMB is recalled by Mr. Maddox in rebuttal.

By Mr. GATLEY:

Q. You know Mr. Ben B. Bradford? A. Yes.

Q. Mr. Bradford has testified in this — that you told him that Mr. and Mrs. Munn interfered with you in the matter of the construction of the addition to the dwelling house of Mr. Munn did you tell Mr. Bradford that? A. No, sir, I never saw Mr. Munn but once in my life, just after the building was completed was the only time I have seen him. So far as my work was concerned it was completed before I saw Mr. Munn except the ball room which was to have been finished after they returned from Europe and it was

134 not finished until then, but the other part of the house was ready for occupancy when they came.

Q. Did you tell Mr. Bradford that Mr. and Mrs. Munn interfered with your work from the start to finish? A. I did not.

Q. Did you tell Mr. Bradford that Mr. Munn was constantly writing to Mr. Hill and that Mr. Hill was giving you instructions to do this and that about the work and those letters were the cause of the delay in finishing the improvement? A. I did not.

By Mr. BRANDENBURG:

Q. You say the ball room was not to be finished until after they returned from Europe? A. Yes.

Q. That was the understanding. A. Yes.

Q. Did you not say * * * Are you acquainted with Mr. Bradford? A. I am.

Q. Did you have a conversation with him in reference to this house? A. No, not that I recall, I saw Mr. Bradford about three weeks ago and I thought he was trying to draw me out.

Q. About three weeks ago? A. Yes. I did not give him any * * * in fact I don't exactly know what he did ask me but * * *

Q. You would not like to say it was two weeks? A. I don't know it may have been a month or it may have been less.

135 Q. Do you remember what he asked you? A. I do not, something he suggested to me about the Munn house, that it was not right, that that projection should not have been made there, but I gave him no answer.

*A.* Were any changes or alterations made in the work after you started from the original plans.

Mr. GATLEY: I object.

The AUDITOR: The objection is sustained.

Mr. LIPSCOMB is called by Mr. Brandenburg as his own witness.

Q. Do you recall about this ball room, this room that you constructed, the large room, do you recall how it was lighted?

Mr. GATLEY: We object.

Mr. BRANDENBURG: I withdraw the question.

Mr Maddox recalled Mr. LIPSCOMB as his witness.

Q. Mr. Bradford says that you told him you had begged and begged Mr. Munn not to make that improvement to his house did you tell him that? A. I did not tell him that, because I had never seen Mr. Munn before the improvement was made completely.

Q. You did not beg Mr. Munn not to make the improvement? A. No.

136 Mr. MADDOX: I announce my case as closed with the exception of filing an agreement to be made regarding the return of Mr. Munn from Europe.

Case submitted, and adjournment taken until Saturday, January 14, 1905 at 10.30 a. m. for argument.

HUTCHINS
*vs.*
MUNN.

SATURDAY, *January* 14, 1904—10.30 a. m.

Hearing pursuant to adjournment.

Present: Messrs. Maddox, Gatley and Brandenburg.

It is admitted that the defendant Charles A. Munn died on the 27th of November 1903; that his last will and testament was thereafter duly probated in the Supreme Court of the District and the defendant Carrie L. Munn who was nominated as the executrix

thereof duly qualified by giving the bond required by the Probate Court.

It is agreed that Mrs. Munn as executrix of the will may be considered as having formally been made a party to this proceeding and having made claim for the expenses incurred by Mr. Munn in coming to Washington from Carlsbad in September 1901 and returning again to Carlsbad to continue the cure which he was then taking.

Mr. MADDOX: I ask the Auditor to allaw me to prove that Mr. Munn came from Carlsbad to Washington and returned again to Carlsbad.

Mr. BRANDENBURG: I object to such proof being taken as the record is closed.

137 Mr. BRANDENBURG: We move to strike out all evidence with respect to the item relating to the injury to the furniture and fixings on the ground that there is no evidence in the proceedings that such damage ever actually occurred as a result of the injunction sued out by the complainant. We also move especially to strike out all evidence relating to the trip of Mr. Munn from Europe to the United States for the reason that there has been no evidence showing the necessity for such visit and the evidence is incompetent as to what he actually spent for the trip and further we move to strike all the evidence relating to the claim for the rental value of the house 1601 Massachusetts Avenue for the reason that the measure of damages is not the rental value but what it would reasonably cost Mrs. Munn to obtain other and like accommodations in the City of Washington.

The AUDITOR: These objections are reserved for the report upon the merits of the case.

Argument.

Adjourned.

138 EXHIBIT No. 1.

W. B. S.

L. R. # 6761-1904.

UNITED STATES OF AMERICA:

DEPARTMENT OF AGRICULTURE,
WASHINGTON, D. C., *June* 11, 1904.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that it appears from the records of the U. S. Weather Bureau, Washington, D. C., that the attached extract copy of the original instrumental records, made by a regular observer of the U. S. Weather Bureau, in the office of observation at Washington, D. C., on the dates specified, has been compared with and is a true extract copy of the original records on file in the Weather Bureau.

H. E. WILLIAMS,
*Acting Chief U. S. Weather Bureau.*

Be it known that H. E. Williams, who signed the foregoing certificate, is the Acting Chief of the U. S. Weather Bureau, and that to his attestation as such full faith and credit are and ought to be given.

139 In witness whereof I have thereunto set my hand, and caused the seal of the Department of Agriculture to be affixed, on this eleventh day of June one thousand nine hundred and four.

J. H. BINGHAM,

[SEAL.] *Acting Secretary of Agriculture.*

U. S. DEPARTMENT OF AGRICULTURE,

WEATHER BUREAU,

WASHINGTON, D. C., *June* 11", 1904.

Division of Meteorological Records.

Copy of the original record of observations made by an observer of the Weather Bureau at Washington, D. C., on the dates and at the hours specified below as regards only the elements named, 75th meridian time.

| 1902, Nov. | Air temperature, Fahrenheit. Maximum. | Minimum. |
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| 23 | 52 | 38 |
| 24 | 55 | 37 |

| | Air temperature, Fahrenheit. | |
|---|---|---|
| | Maximum. | Minimum. |
| 25 | 50 | 45 |
| 26 | 50 | 43 |
| 27 | 50 | 39 |
| 28 | 41 | 32 |
| 29 | 46 | 28 |
| 30 | 45 | 35 |
| 1902, Dec. | | |
| 1 | 47 | 30 |
| 2 | 50 | 32 |
| 3 | 56 | 38 |
| 4 | 49 | 35 |
| 5 | 36 | 31 |
| 6 | 35 | 22 |
| 7 | 43 | 31 |
| 8 | 36 | 22 |
| 9 | 26 | 20 |
| 10 | 44 | 22 |
| 11 | 51 | 37 |
| 12 | 43 | 32 |
| 13 | 34 | 31 |
| 14 | 31 | 22 |
| 15 | 34 | 22 |
| 16 | 42 | 33 |
| 17 | 39 | 31 |
| 18 | 45 | 25 |
| 19 | 52 | 29 |
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| 21 | 60 | 42 |
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| 23 | 44 | 26 |
| 24 | 30 | 19 |
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| 1903, Jan. | | |
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| | Air temperature, Fahrenheit. | |
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| | Maximum. | Minimum. |
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| 9 | 33 | 16 |
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| 9 | 40 | 32 |
| 10 | 46 | 24 |
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| 12 | 61 | 43 |
| 13 | 68 | 36 |
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| 16 | 40 | 26 |
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| 18 | 28 | 3 |
| 19 | 16 | 4 |
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| 21 | 41 | 17 |
| 22 | 32 | 25 |

142 *Defendants' Exceptions to the Report of the Auditor.*

Filed March 13, 1905.

In the Supreme Court of the District of Columbia.

No. 23468. In Equity.

STILSON HUTCHINS, Plaintiff,
*vs.*
CHARLES A. MUNN ET AL., Defendants.

Now comes here the defendant Carrie L. Munn and excepts to the report of the Auditor filed herein on the 18th day of February, 1905, and for cause of exception shows that the Auditor erred:

1. In refusing to allow the sum of $1500, or any part thereof, claimed by her as damages to furniture, &c., in house 1601 Massachusetts Avenue, Northwest.

2. In refusing to allow the sum of $350, or any part thereof, claimed by her as Executor of the Estate of said Charles A. Munn, as damages, being the expenses of said Charles A. Munn from Carlsbad, Austria, to Washington, D. C., and return, for the purpose of securing a dissolution of the injunction granted in this case.

3. In refusing to allow the sum of $100, claimed by her as damages, which amount was paid by her as additional compensation to James G. Hill for services as architect, because of the additional labor devolving on him in consequence of the injunction.

143 4. In refusing to allow the sum of $750, or any part thereof, claimed by her as damages, which amount was expended by her as counsel fees for procuring a dissolution of said injunction and for representing her in the Court of Appeals on the hearing of the appeal of complainant from the order dissolving said injunction.

SAM'L MADDOX,
H. PRESCOTT GATLEY,
*Solicitors for Defendant Carrie L. Munn.*

*Complainants' Exceptions to the Report of the Auditor.*

Filed March 15, 1906.

In the Supreme Court of the District of Columbia.

No. 23468. Equity.

STILSON HUTCHINS
*vs.*
CHARLES A. MUNN ET AL.

Comes now Stilson Hutchins, the above named complainant, by his attorneys, and excepts to the report of the auditor herein and the

findings by said auditor of damages in favor of the defendant Carrie L. Munn, and objects to the confirmation of said report, for the following reasons, to wit:

1. Because said Carrie L. Munn was never enjoined by the temporary restraining order issued herein, and has therefore no right to recover in this proceeding upon the undertaking filed herein.

144 2. Because the amount of damages found by the auditor is unreasonable and excessive.

The evidence of defendants places the total cost of the addition to house #1601 Massachusetts Avenue, the construction of a portion of which was restrained, at $6954.46 (R. 17). According to the testimony of Messrs. Bradford and Smithmeyer, the construction of this addition should have been completed in from four to six weeks after the injunction was discharged. An allowance, therefore, of $6000 as damages for the delay in the completion of such addition is accordingly unreasonable and excessive.

3. In finding and holding, on the evidence, that the defendant Carrie L. Munn sustained any damages whatever by the alleged wrongful and inequitable suing out of the injunction herein.

There is nothing in the evidence showing any loss whatever or damages sustained by the defendant Carrie L. Munn.

4. In finding and allowing damages for the loss of occupancy of the entire house, whereas most of the same was inhabitable.

According to the testimony of the defendant Munn, her house had from twenty-one to twenty-two living rooms exclusive of the small rooms (R. 3) and the rooms directly adjacent to the opening in the wall which were the drawing room, the music room and the basement, were the ones which were damaged (R. 12). While from the testimony of Hill, the only outside walls which were cut was a wall immediately in the rear of the addition and the removal of the bay window (R. 50-56). Numerous other interior improve-

145 ments were made, the completion of which was not restrained by the injunction (R. 50-56) and for which the complainant cannot be held responsible. Furthermore, counsel for the defendant admits that a portion of the house was inhabitable (R. 80).

5. In finding and holding that said Carrie L. Munn was entitled to compensation for the rental value of said house from the first part of November to the following May.

According to the testimony of defendant's witness Lipscomb, it was expected that the work would be completed by the middle of November (R. 16). The restraining order was discharged on November 25, 1902. Had the work been prosecuted with reasonable diligence after the dissolution of the injunction, in accordance with the testimony of witnesses Smithmeyer and Bradford, the entire addition could have been completed in from four to six weeks thereafter. Accordingly, if the rental value constitutes the measure of damages, defendants would be entitled to rent for four to six weeks only.

6. In finding and holding that the fair rental value of said property was $8000. per annum, and that three-fourths of said amount,

to wit, $6000., is the reasonable value of the use of said property during the time said Carrie L. Munn was deprived of the use thereof by their injunction, to wit, from the first part of November to the following May, a period of six months.

Upon the question of the rental value of defendant's property, she has called two witnesses, Mr. Jenkins, with an experience of two years in the real estate business, who testified that the rental
146 value was from ten to twelve thousand dollars per annum and that for a season of six months the rent would be the same as for a year, (R. 29, 30) and Mr. Wescott who placed the rental value at from eight to ten thousand dollars per annum and adds that there would be no difference in the rent for a season and a year (R. 38) Mr. Brainard, who has been in the real estate business for ten years and Mr. Bradford, who has been in the real estate business twenty years, testified that a good annual rental for this property would be $6000. per annum. (R. 70, 75) Mr. Brainard says further that the season's rent is not the same as for a year (R. 70). Mr. Meany, who is an officer of the corporation of Stone & Fairfax, and who has been in business twenty years, testified that the annual rental for this property would be between five and six thousand dollars per year. (R. 98) Unfurnished, Mr. Bradford says, a fair rental value for the house would be $350. per month. (R. 77) According to Mr. Hutchins, who is the owner of house #1603 which adjoins on the West the defendant Munn's house, he says that he has actually rented his house fully furnished with Art Gallery and Ball room attached for the sum of $4500. per annum (R. 100) which house, according to the testimony of Mr. Brainard is equally as desirable as the house of the defendant Munn. (R. 69) From this testimony it would appear that the rent allowed is excessive and unreasonable and beyond the fair value for the use of the property during the time which the defendant Munn was deprived of its use.

7. In finding and allowing damages for the use of said house for a longer term than the period during which the restraining order was in force.

According to the record, the restraining order was enforced
147 two and a half months, while the auditor has allowed rent for a period of six months, which is longer than the time the defendant was actually deprived of its use.

8. In finding and allowing for the rental value of the property for a longer period than the time during which the house was actually under repair or construction.

The Auditor fixes the measure of damages as the value of the use of the property during the period from the first part of November until the following May, while under the testimony it appears that the brick work had been completed and the house was under cover before the severe weather set in. The evidence is indefinite and uncertain as to the exact time when the entire addition was completed or as to what time that part which had been enjoined was completed. (See also reference above made.)

9. In finding and holding that the measure of damages sustained by said Carrie L. Munn is the reasonable rental value of her said house during the period that she was deprived of its possession.

10. In finding and holding that said defendant exercised reasonable diligence in the completion of said house after the dissolution of the restraining order.

According to the testimony of defendant's witness Lipscomb the Superintendent in charge of the construction, the work remaining unfinished at the time the restraining order was issued could have been completed in two and a half months; that the brick work was all completed and the roof was on before the severe weather set in. (R. 22) This being so, there was nothing to prevent the use of artificial heat for the purpose of plastering as has been done and is customary in Washington and elsewhere. (R. 22, 23, 26,
148 79, 80, 85, 86, 88.) According to the testimony of Architect Smithmeyer, the entire work could have been completed in sixty days and at the outside seventy days (R. 94) and according to Mr. Bradford, within six weeks after the discharge of the restraining order (R. 79) Accordingly, had artificial heat been used for the purpose of plastering, if necessary, and reasonable diligence had been exercised, the entire work upon the addition, including that which had not been restrained, could have been completed in from four to six weeks after the discharge of the restraining order, instead — 5½ or six months that was actually taken.

According to the testimony of defendant's witness Walsh, the plasterer, he commenced lathing on the 14th of February, 1903 and plastering on March 4, 1903 (R. 25). In other words, the work was resumed or commenced by him, according to the report of the Weather Bureau on file as an exhibit, about the coldest period of the entire winter, which negatives the idea that the delays were due to severe weather.

11. In admitting evidence to which objection was made, and exception reserved, and in rejecting other testimony, as appears from the record returned with the report of said auditor.

12. For the reason that in assessing damages, the allowance of the Auditor is based upon the fact that the defendant Munn's house was furnished, whereas there was nothing to prevent the use of such furniture by the defendant had she desired to return from Europe and take up her abode in the city of Washington.

According to the testimony of Mr. Bradford, the fair
149 rental value of defendant's house unfurnished would be $350. per month (R. 77).

13. And in divers other matters and things apparent upon the report of said auditor.

STILSON HUTCHINS,
By BRANDENBURG & BRANDENBURG,
*His Counsel.*

*Additional Exception to Report of Auditor of Carrie L. Munn.*

October 2, 1905.

In the Supreme Court of the District of Columbia.

No. 23468. In Equity.

STILSON HUTCHINS, Plaintiff,
*vs.*
CHARLES A. MUNN ET AL., Defendants.

Now comes here the defendant Carrie L. Munn and in addition to the exceptions heretofore noted by her to the report of the Auditor, filed herein on the 18th day of February, 1905, further excepts to said report, and for cause of exception shows that the Auditor erred:—

5. In allowing her but $6000 as damages for the deprivation of the use of her property described in these proceedings, whereas under the evidence adduced he should have allowed her not less than the sum of $10,000.

SAM'L MADDOX,
*Solicitor for Defendant Carrie L. Munn.*

Leave to file granted.
HARRY M. CLABAUGH,
*Chief Justice.*

Octo. 2, 1905.

150 *Order Recommitting Cause to Auditor.*

Filed October 17, 1905.

In the Supreme Court of the District of Columbia.

Equity. No. 23468.

STILSON HUTCHINS
*vs.*
CHARLES A. MUNN ET AL.

This cause having been heard upon exceptions to the Auditor's report, is now upon the court's own motion, and to enable the court to render a proper decree, re-committed to the Auditor to find and report upon the evidence already in, and treating Mrs. Munn as responsible for any and all lack of reasonable diligence on the part of her agents Hill and Lipscomb, or either of them, in the prosecution of the work;—

1st. Whether there was any such lack of reasonable diligence, and if so,—

2nd. What damages she has sustained upon that basis.

Done this 17th day of October, 1905.

WENDELL P. STAFFORD, *Justice.*

151 *Second Report of Auditor.*

Filed December 15, 1905.

In the Supreme Court of the District of Columbia.

In Equity. No. 23468.

STILSON HUTCHINS
*v.*
CHARLES A. MUNN ET AL.

This cause is referred to the Auditor to find and report on the evidence already in and treating Mrs. Munn as responsible for any and all lack of reasonable diligence on the part of her agents, Hill and Lipscomb, or either of them, in the prosecution of the work:

First: Whether there was any such lack of reasonable diligence, and, if so;

Second: What damages she has sustained upon that basis.

After notice to counsel I heard them at length upon the two questions referred to me by the order without taking further proof.

The case as it stands upon the proof at this time presents serious difficulty in determining findings upon these two questions.

When Mrs. Munn decided to make this addition to her property she was not bound to assume or impose upon her architect or builder any conditions as to the speed of the work or time of completion. It is testified by the builder that he expected to finish the work in four months, which fixes the date of completion within the first
152 half of November. That four months is a part of the most convenient and safe season in this climate for building purposes. The work was commenced and progressed until the foundations were dug, and the foundation walls in the addition were built up even with the surface of the ground. A bay window and some of the wall of the main structure had been removed in preparation for the new work. At this point the order of injunction stopped the work on the 14th of August, and prevented progress until after the middle of November.

The period of inquiry as to the existence of delays begins with the resumption of the work. The testimony, therefore, of expert witnesses as to the time in which the entire work could have been done does not materially enlighten this inquiry. It seems necessary to ascertain whether after the resumption of the work it was at any time suspended without reasonable cause.

The brick work I find from the evidence in the case was completed on the 30th of December. Some criticism has been made and assertions of delay in this part of the work, and quite a considerable amount of testimony offered by the counsel for Hutchins with refer-

ence to the possibility of doing brick work in severely cold or freezing weather. The only evidence by witnesses for Hutchins on this point is that the brick work could have been completed in six weeks. As a matter of fact it was so completed. The injunction was dissolved on the 25th of November. Fairly allowing two or three days to get material on the ground and preparations made for resumption of the work, six weeks would carry the time *time* to the last of December. This is the testimony of the witness Bradford introduced by Hutchins, and fails to indicate that there was any un-
153 reasonable delay in the prosecution of the brick work after the work was recommenced.

There then remained the putting on of the roof, that to be followed by carpentry work, preparing for lathing and plastering. The case is destitute of a single estimate of the time within which either of these parts of the work could have been completed. The lathing was begun on the 14th of February, showing an interval of 45 days between the completion of the brick work and the completion of the carpentry work in readiness for the lathers. This would seem to a non-expert as a longer period than should have been occupied, but I am without any reliable basis on which to estimate the delay, if any existed.

The plastering was finished on the 31st of March, showing that this entire work including the lathing occupied another period of 45 days. This was evidently a longer period than should have been required if the work was made to progress with reasonable speed. On this point evidence is furnished by Mrs. Munn for the purpose of showing that in the severe weather in winter it was not safe to do plastering of walls. On the other hand evidence has been offered which sufficiently proves that with proper preparations for protection of the interior building from cold and the use of heat this work could have been continuously in progress during the winter weather. That this heat, either by temporary instruments or by the permanent equipment of the house, could have been furnished and the work progressed seems to be established in proof; and as an estimate of delay I should judge from the interior space of this con-
154 struction, the work of lathing and plastering should have been completed in fifteen days, providing, as I now assume, that it did not include the repairing of any injury done to the pre-existing construction of the residence caused by the building of the addition.

Just what work remained to be done from and after the 1st of April does not clearly appear, or just when the construction was finished, but I find by way of estimate based on proof in the case that there was no unreasonable delay after the 31st of March.

Assuming that there were delays which could have been avoided to the extent of a period of one month, I come to the second direction in the order of re-reference which presents a question much more difficult of determination. The inquiry is, "What damages she has sustained upon that basis."

The property in question is of a class described in my original report as the Washington season residences; that is to say, those

which are as a rule only occupied from about the month of November to the following month of May. In renting property of this kind the prevailing practice is to treat its rental value for that portion of the year as equal to the yearly rent, and whether it be leased for the six or seven months or for the entire year, the rental is substantially the same. Assuming that at the time of the resumption of the work there remained work sufficient to occupy two and one half months of Mr. Lipscomb's original estimate, that would have carried the completion to the 1st of March of the following year. If it be assumed, as I find, that no unreasonable delay occurred prior to the 1st of January, another month's work would
155 have brought it to the 1st of March, and would have completed the builder's estimate of the two and a half months. Even if the work had been completed at that time, it is very evident that the property could not have been rented, and the entire rental season would have been lost. If Mrs. Munn had waited until that time to occupy the residence, she would have been without her home during all the period from November to March by the fault of the complainant Hutchins. If, in the month of November when the work was resumed, she had found and leased other property substantially the same in character, equipment and location, and desired to occupy it till her own residence should be finished, she would have been compelled to pay the full season's or year's rental. So that in either event the injury suffered by her in being deprived of the use of her residence was practically consummated before the 1st of December.

If the property in question were of a different class and of a character that could have been readily rented at any time of the year, by the month or annually, and it was owned for the purpose of investment and income from the rental, a somewhat satisfactory estimate might be made of how far the delays in the progress of the work should diminish the damages, for there the rental of one month would be a satisfactory basis. But as I stated, I do not think that measure can be applied to the property of Mrs. Munn.

I have to report, therefore, that as to the first inquiry submitted in the order of reference I find there was a lack of reasonable diligence in the work of lathing and plastering, which might be roughly estimated at about thirty days.

156 In respect of the second inquiry, as to what damages Mrs. Munn sustained on that basis, I have to report that on the theory adopted by me and from the conditions of the value or use of the premises I am unable to change the allowance.

JAS. G. PAYNE, *Auditor.*

*Exceptions to Auditor's Supplemental Report.*

Filed January 8, 1906.

In the Supreme Court of the District of Columbia.

Equity. No. 23468.

STILSON HUTCHINS
*vs.*
CHARLES A. MUNN ET AL.

Comes now the complainant, Stilson Hutchins, by his attorneys, and without waiving any of the exceptions to the report of the auditor hereinbefore filed herein, but expressly insisting upon each and every one thereof, for further exception to the supplemental report of the auditor herein filed says:

1. That the auditor erred in finding and holding that the delay in lathing and plastering occasioned by lack of diligence on the part of the owner and her agents was thirty days only, whereas such delay was for a period of at least 60 days.

157 2. In failing to find and hold that there was lack of diligence in the prosecution of the brick and carpenter work upon the defendant's property.

3. In finding and holding that notwithstanding lack of diligence on the part of the owner and her agents, Mrs. Munn is nevertheless entitled to an allowance of $6000 as damages.

4. Because the damages allowed are remote, contingent, uncertain and speculative.

5. Because the work on the building was suspended by the injunction for three months and ten days only, whereas the auditor has allowed as damages rental for a period of nine months.

6. Because the damages allowed are so excessive as to be unconscionable.

7. Because the Auditor erred in finding that the prevailing practice in the City of Washington is to treat the rental value of property of the character in question for a portion of the year as equal to the yearly rent, and especially in holding that the property here involved is of that character.

8. And for other and manifest errors appearing in the report of said auditor.

BRANDENBURG & BRANDENBURG,
*Attorneys for Plaintiff.*

Copy of above exceptions received this 8th day of January, 1906.

SAM'L MADDOX,
Per C. FOX.

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*Decree.*

Filed February 26, 1906.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 23468, Doc. 52.

STILSON HUTCHINS, Complainant,
*vs.*
CHARLES A. MUNN ET AL., Defendants.

This cause coming on to be heard upon the exceptions of the complainant Stilson Hutchins, and the defendant Carrie L. Munn to the original report of the Auditor filed herein, and the exceptions of the said complainant to the supplemental report of the Auditor filed herein, the same was argued by counsel for the respective parties and submitted to the court.

It is thereupon, after due consideration thereof, by this court, and the authority thereof, this 26th day of February A. D., 1906, adjudged, ordered and decreed that said exceptions be, and the same are hereby overruled, and that said original and supplemental reports of the Auditor be, and the same are hereby, in all things, ratified and confirmed.

And it further appearing to the court from said original and supplemental reports of the Auditor that the Defendant Carrie L. Munn has suffered or sustained damages to the extent of Six thousand dollars ($6000.) by reason of the wrongfully and inequitably suing out of the injunction herein; and the court being of the opinion that said defendant Carrie L. Munn is entitled to recover

159 of and from the said complainant Stilson Hutchins and William J. Dante and Ben B. Bradford, sureties on the injunction undertaking filed herein on the 14th day of August, 1902, the sum of six thousand dollars ($6000.) damages as aforesaid:

It is further adjudged, ordered and decreed that the said Stilson Hutchins, William J. Dante and Ben B. Bradford, pay to said Carrie L. Munn the sum of Six thousand dollars ($6000.), together with the costs of this suit to be taxed by the clerk; and that she have execution therefor as at law.

By the court:

WENDELL P. STAFFORD, *Justice.*

From the foregoing decree the complainant Stilson Hutchins and William J. Dante and Ben B Bradford, sureties, in open court, note an appeal to the Court of Appeals of the District of Columbia; and upon motion the penalty of an appeal bond to operate as a supersedeas is fixed at Ten thousand dollars ($10,000).

WENDELL P. STAFFORD, *Justice.*

From the foregoing decree the defendant Carrie L. Munn, in open court, notes an appeal to the Court of Appeals of the District of Columbia; and upon motion the penalty of an appeal bond for costs is fixed at One hundred dollars ($100.) and leave granted to deposit the sum of $100 in the registry of this court in lieu of such appeal bond.

WENDELL P. STAFFORD, *Justice.*

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*Memorandum.*

March 13, 1906.—Supersedeas Bond of Stilson Hutchins, William J. Dante and Ben B. Bradford in the penalty of Ten Thousand Dollars, filed.

*Order for Transcript.*

Filed April 6, 1906.

In the Supreme Court of the District of Columbia, the 6" Day of April, 1906.

Equity. No. 23468.

STILSON HUTCHINS
*vs.*
CHAS. A. MUNN ET AL.

The Clerk of said Court will please prepare transcript of record:
Bill,
Restraining order,
Injunction undertaking,
Answers of Def't Munn & Exhibits,
Motions to dissolve injunction,
Order dissolving injunction, dated Nov. 25, '02,
Order of reference to Auditor to ascertain damages, etc., dated May 28, 1903,
First report of Auditor & testimony,
All exceptions to first report of Auditor,
Order of re-reference to Auditor,
Second report of Auditor,
161 Exceptions to second report of Auditor,
Decree overruling exceptions, confirming report, etc.

BRANDENBURG & BRANDENBURG,
*Attorney for Compl'ts.*

It is hereby stipulated that the above shall constitute the record on appeal.

SAM MADDOX,
H. PRESCOTT GATLEY,
*Attorneys for Defendants.*

*Order Extending Time to File Transcript of Record.*

Filed April 19, 1906.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 23468, Doc. 52.

STILSON HUTCHINS, Complainant,
*vs.*
CHARLES A. MUNN ET AL., Defendants.

The court being advised that the record on appeal in the above entitled matter can not be prepared by the clerk of the court within the time limited, it *is* this 19th day of April, A. D., 1906, ordered that the time for filing said record in the Court of Appeals be and is hereby extended to the first day of June, A. D., 1906.

By the Court:

WENDELL P. STAFFORD, *Justice.*

We consent:

SAM MADDOX,
H. PRESCOTT GATLEY,
*Sol'rs for Def'ts.*

162 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 161, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript in cause No. 23468 In Equity, wherein Stilson Hutchins, is Complainant and Charles A. Munn, *et als.*, are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal, of said Court, at the city of Washington in said District, this 15″ day of May, A. D. 1906.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1680. Stilson Hutchins *et al.*, appellants, *vs.* Carrie L. Munn. Court of Appeals, District of Columbia. Filed May 29, 1906. Henry W. Hodges, clerk.

WEDNESDAY, *October* 17*th*, *A. D.* 1906.

No. 1680.

STILSON HUTCHINS, WILLIAM J. DANTE, and BEN B. BRADFORD, Appellants,
*vs.*
CARRIE L. MUNN.

The argument in the above entitled cause was commenced by Mr. E. C. Brandenburg, attorney for the appellants.

THURSDAY, *October* 18*th*, *A. D.* 1906.

No. 1680.

STILSON HUTCHINS, WILLIAM J. DANTE, and BEN B. BRADFORD, Appellants,
*vs.*
CARRIE L. MUNN.

The argument in the above cause was continued by Mr. E. C. Brandenburg, attorney for the appellants, and by Messrs. Samuel Maddox and H. P. Gatley, attorneys for the appellee, and was concluded by Mr. E. C. Brandenburg, attorney for the appellants.

No. 1680.

STILSON HUTCHINS, WILLIAM J. DANTE, and BEN B. BRADFORD, Appellants,
*vs.*
CARRIE L. MUNN.

*Opinion.*

Mr. Justice ROBB delivered the opinion of the Court:

Appeal from a decree of the Supreme Court of the District of Columbia, confirming an auditor's report on the question of damages sustained by appellee by reason of the injunction wrongfully and inequitably obtained by appellant.

The appellee, Carrie L. Munn, in 1888 purchased the house and premises known as No. 1601 Massachusetts avenue, N. W., the consideration being $70,000. This house is located at the corner of Sixteenth street, N. W., and fronts on the avenue. As originally constructed its west wall extended to within 12½ feet of the west line of the lot. Adjoining the Munn premises on the west was the house of appellant, Stilson Hutchins. The east wall of the Hutchins house, for a distance of 28 feet from the northwest corner of the

Munn lot, covered the dividing line between the two lots, and under the building regulations of the District was a party wall for that distance. After purchasing her house Mrs. Munn built two one-story additions to the house, consisting of a billiard room and conservatory. These additions were on the northwest corner of the lot, and in their construction she used and paid for so much of said party wall as was needed. The construction of these additions still left a vacant space fronting Massachusetts avenue 12½ feet wide and 34 feet deep. Sometime in the spring of 1902 Mrs. Munn decided to enlarge her house, so that it would practically cover this vacant space, and in furtherance of this project engaged the services of a skilful architect and a competent builder, and entrusted the undertaking to them. She then went to Europe accompanied by her husband and family. The addition to her house was to be of brick to correspond with the house itself, and to be three stories high. For a ground plan of this addition, see Hutchins *v.* Munn, 22 App. D. C., 92.

The work was commenced about July 1, 1902, and was to be entirely completed within four months from that time, which would have enabled the Munn family to return and occupy the house during the winter season as they had planned to do. The work was progressing satisfactorily when on August 14, 1902, appellant filed his petition in the Supreme Court of the District of Columbia against the Munns and James G. Hill, the architect, and William P. Lipscomb, the builder, and on the same day a temporary order was issued that "the defendants, and each of them, be restrained and enjoined from continuing the erection of the addition" above described. The defendants Hill and Lipscomb were served with process, and work was, of course, immediately discontinued. In conformity with the rules of court, an undertaking was filed conditioned "to make good all damages suffered or sustained by reason of wrongfully and inequitably suing out the injunction." The plan for the addition contemplated the removal of a considerable portion of the wall of the main building adjacent thereto, and, *when the restraining order was issued, this portion of the wall had been removed*, and the foundation walls of the addition were even with the surface of the ground. On August 17, 1902, notice was given Brandenburg & Brandenburg, solicitors for petitioner, that on August 21st, or as soon thereafter as counsel could be heard, a motion was to be made to discharge the rule to show cause and to dissolve the temporary injunction. This notice was signed by Samuel Maddox and H. Prescott Gatley *"as attorneys for defendants,"* and service of same was acknowledged August 17, 1902, by Brandenburg & Brandenburg and W. D. Waugh, solicitors for petitioner. The above motion to discharge the rule, etc., was filed by Mr. Maddox and Mr. Gatley *"as attorneys for defendants."* Mrs. Munn, who was then in Europe, received actual notice of the injunction from her attorney, Mr. Maddox, shortly after it was issued. She made arrangements with her husband that he should return to the United States for the purpose of filing an answer to the bill,

and for the purpose of representing her generally in the matter. On October 30, 1902, a joint and several answer was filed by the Munns to every material allegation in the bill, and on November 25, 1902, after hearing, the Supreme Court of the District of Columbia dissolved the temporary injunction, discharged the rule to show cause, and dismissed the bill. An appeal was prosecuted to this court by Mr. Hutchins, and on May 6, 1903, the decree of the court below was confirmed (Hutchins *v.* Munn, *supra*). On May 28, 1903, the Supreme Court of the District referred the matter to the auditor of that court to ascertain and report the damages, if any, suffered by reason of the wrongful suing out of said injunction. The auditor on February 18, 1905, made a report, and on December 15, 1905, a second or supplemental report. These reports were ratified and approved by the court below, and a decree entered that Mr. Hutchins and his sureties pay Mrs. Munn $6,000 damages together with costs.

From that decree this appeal was taken.

1. It is urged that the court below erred: "in finding and holding that the defendant, Mrs. Munn, was enjoined, and, therefore, entitled to any damages whatever on the injunction undertaking."

So far as the record discloses, this is the first time since the inception of this litigation in August, 1902, that it has been contended that Mrs. Munn was not properly before the court and subject to the restraining order so long as that order was in force. Within three days after the order was issued notice was given the solicitors for the complainant by Mr. Maddox and Mr. Gatley, as attorneys for defendants, that they would shortly move to dissolve the injunction. Mrs. Munn testified that she was notified of the restraining order by Mr. Maddox in August, 1902, which must have been within two weeks from the time it was issued. Mr. Munn soon thereafter returned to the United States, and Mr. Maddox filed a joint and several answer for Mr. and Mrs. Munn to which no objection was made. That appellant's solicitors then understood and believed that Mr. Maddox was fully authorized to enter an appearance in behalf of all the defendants, is apparent from the fact that no effort appears to have been made to serve Mr. Munn with process while he was in the United States. We think the appearance of Mr. Maddox and Mr. Gatley for the Munns was a waiver of actual service, especially as all doubt was removed as to their authority to enter such an appearance by the filing of the above answer on October 30th, which must be held to be a ratification of the authority previously exercised, and to relate back to the original appearance.

Want or insufficiency of service of process in an action for injunction is cured by appearance and plea of defendant. Underwood *v.* Wood, 93 Ky., 177; Cooley *v.* Lawrence, 5 Duer, 605; Parker *v.* Williams, 4 Paige, 439; Seebor *v.* Hess, 5 Paige, 85.

Although notice of an application for injunction is required by statute, it is waived by a voluntary appearance. Enc. P. & P., Vol. 10, 999.

Moreover, we can not assent to the proposition that a defendant

may have actual knowledge of the issuance of an injunction and disobey it with impunity. We think the authorities are to the contrary. In the case *In re* Lennon, 166 U. S., 554, the court, through Mr. Justice Brown said: "The facts that petitioner was not a party to such suit, nor served with process of subpœna, nor had notice of the application made by complainant for the mandatory injunction, nor was served by the officers of the court with such injunction, are immaterial, so long as it was made to appear that he had notice of the issuing of an injunction by the court. To render a person amenable to an injunction it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice. High on Injunctions, 1444; Mead *v.* Norris, 21 Wisconsin, 310; Wellesley *v.* Mornington, 11 Beav., 181."

In Ulman *v.* Ritter, 72 Fed., 1000, this question was discussed, and the court said: "The counsel for defendant seek to relieve him from the responsibility of his conduct in this respect, contending that knowledge thus acquired, of the existence of the injunction, had no legal and binding effect upon him. I can not agree with them in their position, and I am unable to find, either in the text-books, or adjudicated cases, any authority to sustain such a position. If such a position could be maintained, it would destroy to a great extent the effect of the restraining powers of courts of equity, and their usefulness would be greatly impaired. I hold the unquestioned law to be that an injunction becomes operative from the time the order was made, and effective upon the party from the time he has notice of its existence. It is a matter of no moment how the defendant acquired the information of its existence. When once he has been apprised of the fact, he is legally bound to desist from doing what he is restrained and inhibited from doing. If this were not the rule, often great injury could be inflicted, in numberless cases, though the mandate of the court was in existence." See, also, *Ex parte* Richards *et al.*, 117 Fed., 658; State *v.* Knight, 3 S. D., 509; Winslow *v.* Nayson, 113 Mass., 419; Golden Gate Hy. Co. *v.* Superior Ct., 65 Cal., 187; Burr *v.* Kimbark, 29 Fed., 428; Edwards *v.* Edwards, 31 Ill., 474.

Holding, as we do, that Mrs. Munn was properly before the court and subject to the restraining order, it necessarily follows that she was entitled to recover any damages "suffered or sustained by reason of wrongfully and inequitably suing out the injunction."

2. The other assignments of error may be considered together as they all relate to the finding of the auditor that the measure of damages was the value of the use of the property during the season of deprivation; that is, from about November 1st to March 1st, notwithstanding that the injunction was dissolved in November.

In approaching this question we must have in mind the functions of an auditor and the weight and consideration to be given his findings. As was said by this court in Richardson *v.* Van Auken, 5 App. D. C., 209.

"The findings of a master or an auditor, concurred in by the

court below, are to be taken as presumptively correct, and will be permitted to stand unless some obvious error has intervened in the application of the law or the principles of the decree under which he acts, or some important mistake has been made in the evidence, and which has been clearly pointed out and made manifest. This rule has been repeatedly affirmed by the Supreme Court of the United States, and is one of general application in the equity practice, both in the Federal and State courts of the country. Tilghman *v.* Proctor, 125 U. S., 136; Evans *v.* State Bank, 141 U. S., 107; Crawford *v.* Neal, 144 U. S., 585; Furrer *v.* Ferris, 145 U. S., 132."

The question was also discussed in Smith *v.* Trust Co., 12 App. D. C., 192, the court saying: "The auditor is not a mere examiner in chancery, to take testimony for the convenience of the court and to return it to the court for its consideration. The auditor is a judicial officer, charged with judicial functions, as has been repeatedly decided; and his findings of fact are analagous to the verdict of a jury in a suit at common law. Such findings of fact are conclusive unless their correctness is impugned under proper proceedings for the purpose.

* * * * * * *

"In the order of reference there was no requirement that the testimony, which the auditor was directed to take, in order to enable him to reach a determination, should be returned to the court, or made a part of his report; and it may be question whether the fact that he returned the testimony with his report justifies its being considered as part of his report.

* * * * * * *

"It is well settled that, in reference to findings of fact by an auditor or master in chancery, his conclusions 'depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified, unless there clearly appears to have been error or mistake on his part' (Tilghman *v.* Proctor, 125 U. S., 136, 149), which rule as repeated in the case of Callaghan *v.* Myers, 128 U. S., 617. In the case of Richardson *v.* Van Auken, 5 App. D. C., 209, 213, and again in the case of Grafton *v.* Paine, 7 App. D. C., 255, as well as in some subsequent cases, we have had occasion to enforce this same rule." See, also: Grafton *v.* Paine, 7 App. D. C., 255; Haller *v.* Clark, 21 D. C., 128; York *v.* Tyler, 21 D. C., 265; Ry. Co. *v.* [illegible]lon, 151 U. S., 285.

In his first report the auditor found: "That this property was purchased by Mrs. Munn some years ago at a cost of seventy thousand dollars and that since that time sundry improvements or additions have been constructed at a substantial cost. The house was purchased and maintained for the occupation of Mrs. Munn and her family and was furnished in a style corresponding to its character and size. It was the practice of the family to occupy the house from the fall until the late spring and for the remainder of the year they spent the time at other localities in this country or abroad.

*The progress of the work on this addition at the date of the restraining order was such as to render the house for dwelling purposes practically uninhabitable.*

* * * * * * *

Taking up the claim for the loss of the use of the property resulting from the restraining order it appears in proof that the work on the addition to the main house was commenced the first week in July and was intended to be completed in four months, which would have brought the completion to the early part of November, *in time for the family to resume their occupation.* At the date of the restraining order approximately a month and a half of the estimated time had elapsed and a proportionate part of the work done. The work was then suspended until the decree of this court on the 25th of November dissolving the restraining order, so that three months and ten days of useful time of this character of work had been wasted. The building of the addition was not completed and the house ready for suitable occupancy until late in April or very early in May of 1903, near the time at which it was the custom of the family to leave Washington for their summering. They were, therefore, deprived of the use of the property for the entire season of customary occupation.

* * * * * * *

That there is a Washington season which affects the rental term and occupancy of a certain class of property is a fact so generally known as to come nearly, if not quite, within the scope of judicial notice. The property in question is of that class. This so-called season was the customary period of occupation by Mrs. Munn and her family. The claimant, Mrs. Munn, is entitled to the value of the use of the property during the season of deprivation and the evidence is to be applied to that period, not solely for the purpose of showing what she lost as rent or income, but to determine what it would have cost her to procure the use of other property approaching her own in location, condition, and equipment during such time. Taking the estimate of the several witnesses touching the rental value of Mrs. Munn's property, I find a fair mean to be the sum of eight thousand dollars per annum, of which I find three-fourths, being six thousand dollars, to be the reasonable value of the use of the property for the period during which she was deprived of its use by reason of the injunction."

Because the auditor found in this report that Mrs. Munn was not responsible for delay in the progress of the work after the dissolution of the restraining order, she having employed a competent architect and a competent builder to superintend the work, the case was again submitted to him to find "whether there was any lack of reasonable diligence, and, if so, what damages she (Mrs. Munn) has sustained upon that basis." In this second report the auditor after a consideration of the testimony, said:

"If it be assumed, as I find, that no unreasonable delay occurred prior to the 1st of January, another month's work would have

brought it to the 1st of March, and would have completed the builder's estimate of the two and a half months. Even if the work had been completed at that time, it is very evident that the property could not have been rented, and the entire rental season would have been lost. If Mrs. Munn had waited until that time to occupy the residence, she would have been without her home during all the period from November to March by the fault of the complainant Hutchins. If, in the month of November when the work was resumed, she had found and leased other property substantially the same in character, equipment, and location, and desired to occupy it till her own residence should be finished, she would have been compelled to pay the full season's or year's rental. So that in either event the injury suffered by her in being deprived of the use of her residence was practically consummated before the 1st of November."

The auditor, therefore, adhered to his original finding as to the damages sustained by Mrs. Munn. The record shows that he carefully considered and gave due weight to all the evidence submitted to him, and, in a case like this where his report has been ratified and confirmed by the court below, we are not disposed to disturb the findings therein unless fully convinced such findings are not sustained by the evidence, or that they are predicated upon an erroneous view of the law. Doubts as to the findings of an auditor certainly should not be resolved against the injured party and in favor of the party causing such injury. We have carefully examined the whole record, and have reached the conclusion that the auditor's findings are justified by the evidence. Mrs. Munn testified, and her testimony was not disproved, that her plans, by reason of the delay caused by the restraining order, "were decidedly changed * * * as this restraining order was not dissolved until the 21st of November, the building then had to go on and it prevented us from occupying our house until late in the spring." On cross-examination she was asked:

"Q. Now, Mrs. Munn, in the fall of 1902 was it not your intention to remain in Europe that fall? A. That was not our intention so far as I knew anything about it. We had our cabins engaged to return to Washington and had to give them up, perhaps at a sacrifice.

"Q. You know that of your personal knowledge? A. Yes."

It seems to us, therefore, that the auditor from this and other testimony was justified in finding that the Munn family intended to return to Washington and occupy their home during the winter of 1902-3. We think the finding of the auditor that there was a delay "roughly estimated at about thirty days" in the progress of the work after the injunction was dissolved, was a very liberal finding in favor of the appellant, in view of the fact that it would have taken two months and a-half to complete the work during the period when the work could have been *been* advantageously prosecuted; that is, from the middle of August, when the work was stopped by the injunction, until the 1st of November. Considering all the testimony and having in mind the character and quality of the work,

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and that it had to be prosecuted during the winter months, we are unable to say that there was any unnecessary delay. The addition Mrs. Munn planned was to be perfect in execution and in keeping with the house itself. She engaged skilful and competent men to prosecute the work, and instructed them to procure the best materials obtainable. She had a right to expect and to receive a satisfactory and adequate return for her money, and Mr. Hutchins ought not to be heard to complain because the work after the dissolution of the restraining order was not prosecuted with as much haste as it could and, no doubt, would have been prosecuted during the months of September and October. The auditor found, however, that, even though the house had been completed early in March, the damages suffered by Mrs. Munn would have been the same, because it would have cost her as much to rent a similar house from November to that time as for the season.

While the amount awarded seems large, we are unable to find from the evidence that it is excessive. The property, aside from the furnishings of the house, represented an investment of more than $100,000, and the finding was based upon the testimony of witnesses familiar with the rental value of similar houses in the locality of the Munn house.

The point is made that in no event could Mrs. Munn recover damages for the loss of the use of the whole house because she was restrained from building the addition only. We think this contention untenable. Mr. Hutchins delayed action a month and a half and did not arrest the progress of the work until the main house, as the auditor found, had been rendered "practically uninhabitable" by the removal of a considerable portion of the outside wall adjacent to the addition, and because of and in connection with the construction of the addition. The house continued to be uninhabitable; that is, unsuitable for the purposes of a family dwelling until the addition was completed, and, inasmuch as the completion of the addition was stayed through the procurement of the restraining order, we think Mr. Hutchins must make good the damages directly resulting therefrom.

Objection is made that Mrs. Munn is not entitled to damages because she did not in fact return to Washington and in fact rent a similar house for the season. It appearing that Mrs. Munn but for this injunction would have returned to occupy her house during the season, we think she is entitled to damages for being kept out of it, notwithstanding she did not elect to live in some other similar house in Washington during that period. It was for her to determine whether she would occupy some other house in Washington, or whether, being kept out of her own house by the wrongful act of the appellant, she would live elsewhere during the winter of 1902-03; and the appellant is not in a position to complain because she chose the *the* latter course. "Where a party is restrained by an injunction, wrongfully sued out, from exercising acts of ownership over land, he will be entitled to such damages as are the necessary and proximate result of that deprivation. In determining their extent

the court proceeds upon equitable principles, and is not governed by arbitrary or technical rules." 16 A. & E. Enc. of L. (2d ed.), 466.

The case of Edwards *v.* Edwards, 31 Ill., 474, was an action of debt upon an injunction bond. The plaintiff, by reason of the injunction, had been deprived of the use and enjoyment of certain property from March to September following, and in the opinion in that case the court observed: "The principal question, however, on the assessment of damages, is as to the use of the land. The injunction was issued early in the spring, and was dissolved early in September and during that time restrained the party from taking possession of a certain farm. The defendants insisted that the measure of damages was the value of the use of the land up to the time when the injunction was dissolved. We think the court properly allowed the evidence to take a wider range, and show that being kept out of the land, till the first day of September, occasioned the loss of the crops for the season. The question is not, what was the land worth to the complainant in the injunction suit, but, what was the damage to the defendant for being kept out of possession during that period."

In Smith *et al. v.* Wells, 46 Miss., 64, which was a suit on an injunction bond, the court said: "The loss of the use and rental of the premises for a year was the result of suing out the writ; or, at all events, the jury have certified that damages to the extent of one year's rent has ensued. But for the interference of the complainant, Mrs. Wells or her tenants would have occupied the premises, or she would have recovered possession, perhaps, in time to have made them available.

* * * * * * *

"The party injured by the injunction is entitled to compensation for all loss and injury, actually and fairly referable to the wrongful act of the obligor." See, also, Lange *v.* Wagner, 52 Md., 310; Banks *v.* State use Ranstead, 62 Md., 88; Hicks *v.* Hekring, 17 Cal., 566; Roberts *v.* White, 73 N. Y., 375; Alexander *v.* Colcord, 85 Ill., 323; Jones *v.* Allen, 85 Fed., 523.

Appellant in his brief refers to the admiralty case of The Conqueror, 166 U. S., 110, as being in point on this question of the assessment of damages. That case was a libel to recover possession of the steam yacht Conqueror, which had been illegally detained by the Collector of Customs for the District of New York, and for damages for the illegal detention. It appears that the vessel *was designed for pleasure only*, and had never been put to any other use. The court said: "The main question in this case turns upon the proper measure of damages. In the amount of $21,742.24, awarded by the final decree of the District court, was included the sum of $15,000, 'for loss of use of boat while detained by the respondent, from August 27, 1891, to February 3, 1892, at $100 per day.' This is the principal item of damages to which objection is made in this court."

After directing attention to the fact that damages caused by an illegal seizure of a ship are in the nature of demurrage, and that,

therefore, there must be actual loss in order to warrant a recovery, the court further said: "The difficulty is in determining when the vessel has lost profits and the amount thereof. The best evidence of damages suffered by detention is the sum for which vessels of the same size and class can be chartered in the market. Obviously, however, this criterion can not be often applied, as it is only in the larger ports that there can be said to be a market price for the use of vessels, particularly if there be any peculiarity in their construction which limits their employment to a single purpose. In the absence of such market value, the value of her use to her owner in the business in which she was engaged at the time of the collision is a proper basis for estimating damages for detention, and the books of the owner showing her earnings about the time of her collision are competent evidence of her probable earnings during the time of her detention.

* * * * * * *

"Again, the court may properly take judicial notice of the fact that the yachting season in our northern waters practically comes to an end before the first of November, and, as The Conqueror was seized on August 27, during more than one-half the time for which demurrage was allowed she probably would have been laid up at her wharf. It is true there was a possibility that her owner might have desired her for use in a winter's cruise to tropical waters; but there was not the slightest evidence of that, and the contingency of her being so used was too remote to justify an allowance upon that basis."

We think there is a clear distinction between the case of The Conqueror and the case at bar. The Conqueror was a pleasure yacht only, and there was no evidence that her owner intended to use her during the period she was held by the collector. Moreover, she had been seized by an officer of the United States in the line of his duty, and although it subsequently transpired that he had acted under a misapprehension of the law, the circumstances of the case demanded that clear, positive, and certain proof of actual loss be adduced to entitle her owner to recover damages for her detention.

In the present case we are dealing with a dwelling-house and the home of the injured party. The testimony not only shows the value of the use of similar homes, but it shows that Mrs. Munn would have occupied and received benefit from her home, but for the injunction wrongfully procured by appellant.

The damages awarded her were, we think, the direct result of the injunction, and comprehended within the terms of the undertaking entered into by appellant and his sureties "to make good all damages suffered or sustained by reason of wrongfully and inequitably suing out the injunction."

The decree appealed from, in our opinion, should be affirmed, with costs, and it is so ordered.

Affirmed.

WEDNESDAY, *November 7th, A. D.* 1906.

No. 1680, October Term, 1906.

STILSON HUTCHINS, WILLIAM J. DANTE, and BEN B. BRADFORD, Appellants,
*vs.*
CARRIE L. MUNN.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per Mr. JUSTICE ROBB.

November 7, 1906.

FRIDAY, *November 16th, A. D.* 1906.

No. 1680.

STILSON HUTCHINS, WILLIAM J. DANTE, and BEN B. BRADFORD, Appellants,
*vs.*
CARRIE L. MUNN.

On motion of Mr. E. C. Brandenburg, of counsel for the appellants in the above entitled cause, It is ordered by the Court that said appellants be allowed an appeal to the Supreme Court of the United States, and the bond to act as supersedeas is fixed at the sum of eight thousand dollars.

(*Bond on Appeal.*)

Know all men by these presents, That we, Stilson Hutchins, [William J. Dante and Ben B. Bradford]*
William J. Dante and Ben B. Bradford, as principals, and The United States Fidelity & Guaranty Co., as surety, are held and firmly bound unto Carrie L. Munn in the full and just sum of eight thousand ($8000.00) dollars, to be paid to the said Carrie L. Munn, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this twentieth day of November, in the year of our Lord one thousand nine hundred and six.

[* Words enclosed in brackets erased in copy.]

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between Stilson Hutchins, William J. Dante and Ben B. Bradford,
[William J. Dante and Ben B. Bradford]* as appellants, and Carrie L. Munn as appellee, a decree was rendered against the said Stilson Hutchins, William J. Dante and Ben B. Bradford, and the said Stilson Hutchins, William J. Dante and Ben B. Bradford having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Carrie L. Munn citing and admonishing her to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said Stilson Hutchins, William J. Dante & Ben B. Bradford shall prosecute said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

STILSON HUTCHINS. [SEAL.]
WILLIAM J. DANTE. [SEAL.]
BEN B. BRADFORD. [SEAL.]
LEE HUTCHINS. [SEAL.]
THE UNITED STATES FIDELITY & GUARANTY CO., [SEAL.]
By J. S. SWORMSTEDT, *Attorney in Fact.*

[Seal of United States Fidelity & Guaranty Co.]

Sealed and delivered in presence of—
WM. L. SWORMSTEDT.

Approved by—
SETH SHEPARD,
*Chief Justice Court of Appeals of the District of Columbia.*

All erasures and interlineations made before signing.

THE UNITED STATES FIDELITY & GUARANTY CO.,
By J. S. SWORMSTEDT, *Att'y in Fact.*

[Endorsed:] No. 1680. Stilson Hutchins, William J. Dante and Ben B. Bradford *vs.* Carrie L. Munn. Supersedeas Bond on Appeal to Supreme Court U. S. Court of Appeals District of Columbia. Filed Nov. 20, 1906. Henry W. Hodges, Clerk.

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* Words enclosed in brackets erased in copy.

UNITED STATES OF AMERICA, *ss:*

To Carrie L. Munn, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Stilson Hutchins, William J. Dante and Ben. B. Bradford, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 20th day of November, in the year of our Lord one thousand nine hundred and six.

SETH SHEPARD,
*Chief Justice of the Court of Appeals of the District of Columbia.*

Service accepted this 20th day of November A. D. 1906.
SAM. MADDOX,
H. PRESCOTT GATLEY,
*Sol's for Appellee.*

[Endorsed:] Court of Appeals, District of Columbia. Filed Nov. 20, 1906. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 94 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Stilson Hutchins, William J. Dante and Ben B. Bradford, Appellants, *vs.* Carrie L. Munn, No. 1680, October Term, 1906, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 26th day of November A. D. 1906.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
*Clerk of the Court of Appeals of the District of Columbia.*

Endorsed on cover: File No. 20,477. District of Columbia Court of Appeals. Term No. 163. Stilson Hutchins, William J. Dante, and Ben B. Bradford, appellants, *vs.* Carrie L. Munn. Filed December 6th, 1906. File No. 20,477.

On August 17, 1902, answers were filed on behalf of the defendants, Hill and Lipscomb. At the same time a motion was filed in their behalf to discharge the rule to show cause and to dissolve the preliminary injunction above referred to. (R., p. 41.) This motion came on for hearing on the 21st day of August, 1902, but the court refused to consider the matter until an appearance should be entered and an answer should be filed in behalf of Mrs. Munn, the principal defendant and owner of the property. (R., p. 41.)

Notwithstanding this opportunity afforded to speedily dispose of the matter the answer of Mrs. Munn was not filed until October 30th following, more than two months after the granting of the order, though the answer was sworn to in New York on the 8th day of October, twenty-two days before it was actually filed. There is no satisfactory explanation of the long delay in the preparation and execution of the answer and none whatever explaining the delay of 22 days between the date of the execution of the answer and the filing thereof.

After the filing of this answer, the case came on for hearing on a motion to discharge the temporary restraining order, and on the 21st day of November, 1902, an order was passed discharging the rule and vacating the order. Thereafter, because the cause had been prematurely referred to the auditor to ascertain the damages sustained by the defendant because of the injunction, the court below, on the 25th day of November, vacated the order of November 21st and passed an order (R., p. 17) dissolving the temporary injunction and discharging the rule to show cause granted the 14th day of August.

An appeal was thereupon applied for and allowed. The Court of Appeals of the District of Columbia affirmed the judgment of the court below, and thereupon, on the 28th

day of May, 1903, an order was passed by the court below referring the cause to the auditor to "ascertain and report the damages, if any, suffered or sustained by the defendants, or any of them, by reason of the wrongful and inequitable suing out of said injunction." (R., p. 17.)

On this reference considerable testimony was taken in behalf of the parties to the cause, all of which was returned with the report of the auditor and filed in the court below on the 18th day of February, 1905 (R., p. 18) and is contained in the record on appeal now before this court.

Mrs. Munn claimed, under the reference, to have suffered by reason of the injunction, damages aggregating $12,700.00 (R., p. 20) for loss of the use of the house, damages to the furniture, additional compensation paid to the architect, attorney's fees for procuring the dissolution of the injunction, and the expense of Charles A. Munn from Carlsbad to Washington.

The testimony under the reference and returned with the report of the auditor showed that Mrs. Munn began the erection of a three story brick addition to her dwelling in the first week of July, 1902. This addition was to be 32 feet in depth by 72 feet in width and three stories in height. There was also being constructed by her at the same time, a one story addition to the main building for a ball room. The injunction was granted on the 14th day of August. At the time the injunction was granted work had been progressing for one and one-half months, and during this period the foundation walls of the addition had reached to the level of the ground. The builder said the work was intended to be completed in four months, which, if true, or possible, would have brought the completion early in November. The injunction was dissolved on the 21st day of November, 1902, though on the application of the defendant, this order was vacated because of certain defects

and a new order was passed on the 25th of November (R., p. 17). The injunction was therefore in force from August 14th to November 21st, a period of three months and seven days. After the dissolution of the injunction, the prosecution of the work was resumed but the improvements were not completed until in the month of May following; that is to say, though the builder claimed he intended to complete the work upon the addition that was enjoined, together with the additional work upon the ball room within four months from the beginning of operations, the same work, though it had progressed for one and one-half months before the injunction had issued, took from November 21st until early in May following, a period of five and one-half months after the injunction was dissolved, for completion. During all this time the defendant, Carrie L. Munn was absent in Europe and did not return to the United States.

The auditor rejected all claims for damages presented in behalf of the defendant except that for the loss of the use of the main building and the proposed addition. With reference to the item of $1,500.00 damages to the furniture the auditor found (R., p. 20) that Mrs. Munn was the only witness who testified in regard thereto and that her evidence "is deficient in all essential respects." He also found that the evidence did not show that any part of the alleged injury was the result of the restraining order; that the "prohibited work was suspended from the 15th of August to the 25th of November (21st) while other work upon the property was carried on which was *more likely to cause the alleged injury* than that covered by the order." (R., p. 20).

It was claimed by the appellant, and we think clearly shown, that after the dissolution of the restraining order the work was not prosecuted with reasonable diligence. Without passing upon the sufficiency of the evidence offer-

ed in this regard, the auditor held that as Mrs. Munn had employed an architect and builder he must hold that she was justified in submitting to their judgment the question of when the work should proceed, having due regard to the weather conditions and other circumstances (R., p. 32).

Accordingly, he held that Mrs. Munn was not responsible for unreasonable delay in the prosecution of the work after the dissolution of the injunction. The auditor further held that there is in the city of Washington a season which fixes the rental term and occupancy of a certain class of property and that this fact is so generally recognized as to come nearly, if not quite, within the scope of judicial notice and that the property of the defendant was of that class; that this so called season was the customary period of occupation by Mrs. Munn and accordingly he held "the measure of damages must be the value of the use of the property during the period from the first part of November to the following May," (R., p. 22); that is to say, he held the appellant responsible, not only for the period during which the injunction was in force, but for a period subsequent thereto. He further found that the rental value of the property for a year was $8,000.00 and that three-fourths of this or $6,000.00 was the reasonable value of the use of the property for the period during which she was deprived of its use by reason of the injunction. (R., p. 22).

Various exceptions to this report were filed on behalf of the appellant (R., p. 73) and of these, certain exceptions were addressed to the rule of law adopted by the auditor to the effect that having employed a skilled architect and builder, Mrs. Munn was not chargeable with unreasonable delay in the prosecution of the work after the dissolution of the injunction, and secondly, that as the injunction was actually in force only three months and seven days, Mrs. Munn was not entitled to damages for the season's rental,

or $6,000.00. Upon hearing of these exceptions, the Supreme Court of the District of Columbia, below passed an order (R., p. 77) recommitting the cause to the auditor upon the evidence already taken, and held that, Mrs. Munn was to be deemed responsible for any and all lack of reasonable diligence on the part of her agents in the prosecution of the work, and the auditor was required to find and report whether there was any such lack of reasonable diligence, and, if so, what damages she had sustained upon that basis. Thereupon the auditor filed a second report (R., p. 78). In this report the auditor found that the brick work of the addition was completed on December 30th. The evidence failed to show that anything whatever was done between that date, December 30th, and the 14th day of February, when the work was resumed. The auditor says, "This would seem to a non-expert as a longer period than should have been occupied, but that I am without any reliable basis on which to estimate the delay, if any existed." (R., p. 79.) The appellant contended that the burden rested upon the defendant to show that some work had been done during this period. There was no evidence whatever that there was any work being done during this period that related to the addition enjoined in any way whatever. As a matter of fact, except a trifling amount of work, there was nothing to be done. The lathing and plastering were begun on February 14th, and was completed on March 31st, showing, as the auditor found, "that this entire work, including the lathing, occupied another period of 45 days;" that this "was evidently a longer period than should have been required if the work was made to progress with reasonable speed" (R., p. 79), and the auditor found that this work of lathing and plastering the three-story addition, 32 feet by 12 feet in size, which consumed, according to the testimony, 45 days, should have been completed in 15 days.

But the auditor adhered to his ruling that notwithstanding this unreasonable delay in the prosecution of the work, Mrs. Munn was entitled to recover damages for the season's rental, or nine months, at the rate of $8,000.00 per annum; that is to say, $6,000.00.

The auditor further found that the property was not intended for rental (R., p. 80). This fact is undoubted; indeed, it is not denied.

Exceptions were filed to this additional report (R., p. 81), but were all overruled and the original and additional report of the auditor were confirmed and a decree entered by the court below against the appellant and his sureties upon the injunction undertaking for the sum of $6,000. The total cost of the improvements, including the cost of the one-story addition and ball room not affected by the injunction, together with architect's fees, was $6,900.00.

From the decree of the Supreme Court of the District of Columbia confirming the report of the auditor, an appeal was prosecuted to the Court of Appeals of the District of Columbia, which on November 7, 1906, affirmed the decree of the lower court. From the decree of the Court of Appeals this appeal has been prosecuted.

## ASSIGNMENT OF ERRORS.

The court below erred:

1. In confirming the report of the auditor and decreeing the payment by the appellant and his sureties of the sum of $6,000.00.

2. In confirming the rule of law adopted by the auditor that the appellant is liable for a season's rental value of the dwelling of Mrs. Munn.

3. In holding that the appellant is responsible for the value of the use of the defendant's property for a longer period than the injunction was actually in force.

4. In holding the appellant liable for the season's rental value of the property, notwithstanding unreasonable delays of the defendant in the completion of the work.

5. In finding and holding that the defendant, Mrs. Munn, was enjoined, and, therefore, entitled to recover any damages whatever on the injunction undertaking.

6. In finding and holding that the defendant, Mrs. Munn, sustained any damage whatever by reason of the injunction, even though enjoined.

7. In finding and holding that $6,000.00 was a reasonable value of the use of the property.

8. In finding and allowing damages for the loss of the occupancy of the entire house, whereas most of the same was habitable.

9. In finding and allowing damages for the loss of the use of the main building, though the injunction related exclusively to the progress of work upon the addition thereto.

10. In not finding and holding, if entitled to anything at all, that the measure of damages is the reasonable rental value of the house during the period the injunction was in force.

11. In finding and holding that the damages allowed were due exclusively to the injunction, whereas, there was other work being done upon the premises which continued pending the injunction and which rendered the occupation of the dwelling of the defendant impossible.

12. In failing to find and hold that the property of the defendant, not being intended for rental, and no effort having been made to rent the same, and no tenant therefor having been found, that the measure of damages was the amount that the defendant was required to pay for the use of other property of similar nature and no expense having been incurred on that account in failing to find that the defendant had sustained no damage whatever.

13. In finding and holding, even though the property was of the class usually rented by the season, that the defendant's property could have been rented.

## BRIEF.

On behalf of the appellant it is earnestly contended that the decree of the court below cannot be sustained on any theory; that even if the defendant is entitled to any allowance by way of damages that the allowance made is grossly excessive, inequitable and unconscionable and therefore illegal. The exceptions filed to the report of the auditor and covered by the assignments of error in this court may be divided into two classes, first, those which deny any liability on the injunction undertaking, and second, assuming such liability, those which relate to the measure of damages adopted and the allowance made by the auditor.

The primary and basic contention of the appellant is that Mrs. Munn was never enjoined and is therefore not entitled to recover on the injunction undertaking.

## AS MRS. MUNN WAS NOT WITHIN THE UNITED STATES AND WAS NOT SERVED WITH PROCESS OR THE RESTRAINING ORDER, SHE CANNOT RECOVER ON THE UNDERTAKING.

The bill of complaint was filed August 14, 1902. The temporary restraining order and rule to show cause were issued the same day. On August 27, the answers of the architect and builder, who alone had been served with process, were filed. On the same day, a motion to discharge the rule and temporary restraining order was filed and signed generally by counsel, as "Attorneys for defendants" (Rec., p. 6). At this time Mrs. Munn was in Eu-

rope and remained there until after the injunction was finally dissolved and the suit dismissed. There was no service upon her of the subpoena to answer or of the rule to show cause. The answer of Mrs. Munn was sworn to by her husband in New York on October 8, 1902, (Rec., p. 15), but was not filed until October 30, 1902. (Rec., p. 8.) There was no formal appearance on behalf of any defendant. The appearance in each instance was by answer.

The appellant insists that as Mrs. Munn was not within the United States while the temporary restraining order was in force and was not served with process or with the rule to show cause, she cannot recover on the injunction undertaking; or, at most, she can only recover for the damages, if any, sustained between the date of her answer and the date the injunction was dissolved, and as no damages are shown which are attributable to that period alone, there can be no recovery whatever in her behalf.

(A) NO APPEARANCE FOR MRS. MUNN PRIOR TO OCT. 30TH.

The Court of Appeals, in its opinion, (Rec., p. 87), says, that so far as the record discloses, on appeal, was the first time, since the inception of the litigation, that it was contended that Mrs. Munn was not properly before the Court and subject to the restraining order so long as that order was in force.

The Court is in error. The very first exception to the first report of the auditor, filed as soon as the auditor's first report was made, and before the hearing in the trial court, was that Mrs. Munn was never enjoined by the temporary restraining order herein and therefore had no right to recover upon the undertaking filed here. (Rec., p. 74.) That surely is a complete answer to the position taken by the Court of Appeals.

But the Court proceeded to hold that the signature gener-

ally of counsel as "attorneys for defendants," affixed to the motion to discharge the restraining order (Rec., p. 8), constituted an appearance and a waiver of actual service, especially, as the court says, the subsequent filing of the answer on October 30th, was a ratification thereof.

We respectfully submit that both positions are untenable. The first appearance on behalf of Mrs. Munn was by the filing of her answer. The motion to discharge the restraining order, which is signed generally "attorneys for defendants" accompanied the cause shown by the architect and builder, who had been served with process and was filed therewith. It was an application by *those* defendants, based upon the cause shown by *their* answers, to discharge the rule. It was never suggested at the argument in the trial court that this constituted an appearance on behalf of Mrs. Munn; on the contrary, when the motion to discharge the rule came on for hearing in the first instance, the court refused to act upon it until the principal defendant, Mrs. Munn, should enter her appearance and file her answer, and that accounts for the postponement of the hearing upon the rule. (R., p. 41.) That the motion was intended to be filed on behalf of the answering defendants alone, as it was in fact, is further apparent from the circumstances that a copy of this motion was served on appellant's counsel on August 17, (R., p. 8) *three days* after the restraining order was issued, while Mrs. Munn was not informed of the institution of suit until *several weeks after it had been filed.* This was found as a fact by the Court of Appeal (R., p. 87). Moreover, Mr. Gatley, who signed the motion, also signed the name of Mr. Maddox thereto. Mr. Maddox was the attorney for Mrs. Munn; Mr. Gatley was not. Mr. Maddox was also in Europe at the time the suit was filed, at the time the motion was signed and filed and knew nothing about it. Mr. Maddox (Rec., p. 50) says, that the answers

of Messrs. Hill and Lipscomb, the architect and builder, who had been served with process, were prepared during his absence in Europe. "I was not here at all," he says. We have a case therefore where Mrs. Munn was in Europe at the time the motion was signed and filed; her counsel was in Europe at the time the motion was signed and filed; the attorney who signed the name of Mr. Maddox to the motion was never the attorney for Mrs. Munn; neither Mrs. Munn nor her attorney *knew of the pendency of the suit at the time the motion was filed.* Another circumstance emphasizing the fact that the signature in question was not even regarded as an appearance on behalf of Mrs. Munn, is, that on the day her answer was filed, a separate motion, in all respects like the motion accompanying the other answer, was filed *in her behalf*, signed by Mr. Maddox as *her attorney*, to discharge the rule based upon the cause shown in *her answer* (Rec., p. 16). These circumstances are in fact nothing short of conclusive, that although the motion was signed generally, it was not signed on behalf of Mrs. Munn; that it was intended as a motion on behalf of the persons, served with process, to discharge the rule upon the cause shown by their answers. This is further apparent from Mr. Maddox's testimony (Rec., p. 50) where he says that Mr. Gatley, who signed the motion, wrote him that he would prepare answers for the architect and builder "and expected to get a discharge of the restraining order *on their answers.*"

To hold that the signature referred to constitutes an appearance on behalf of Mrs. Munn, would permit her to occupy an ambiguous position, permitting her to claim that she was properly before the court, if to her interest to do so, and to repudiate it if to her prejudice. Certainly no relief could have been obtained against Mrs. Munn on such an appearance. Both she and her counsel were abroad at the time

and neither knew of the filing of the motion, while the attorney who signed the motion was not authorized to do so in her behalf.

> "While it may be immaterial, and a mere matter of practice, as to what formal steps must be taken to enter an appearance, and while all formalities may be done away with, yet it is imperative that a party must occupy no ambiguous position. A party must either appear at a trial and abide the consequences, or not appear. He cannot occupy an uncertain status, partly appearing and partly not appearing."
>
> Enc. Pl. & Pr., Vol. II, P. 593.
>
> "When there has been no service on the defendant, the record should show an appearance.
>
> Enc. Pl & Pr., Vol. II, P. 596.

Moreover the rule is that where there are several defendants, some served with process and some not served, a motion filed on behalf of the defendants generally, without intimating for whom the motion is made, will be restricted to those actually served with process.

> But there are some authorities which hold that where there are several defendants, and a plea is filed for a part of them without distinguishing for whom it is filed, or if the record uses the plural form, it will amount to an appearance for all of the defendants, unless it otherwise affirmatively appears.
>
> * * * * * *
>
> "But the better-considered cases and the probable weight of authority would seem to hold that when the record, in general terms, shows the appearance of par-

—IN THE—

# Supreme Court of the United States.

**October Term, 1907**

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STILSON HUTCHINS, *et al.*, APPELLANTS,

*vs.*

CARRIE L. MUNN.

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No. 163.

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## STATEMENT OF FACTS AND BRIEF FOR APPELLANTS.

On August 14, 1902, Stilson Hutchins, the appellant, filed a bill of complaint in the Supreme Court of the District of Columbia, against the appellee, her husband, her architect and her builder, wherein he alleged the ownership by him of certain lots in Square 181, in the City of Washington, improved by a dwelling, and the ownership, by the defendant, Carrie L. Munn, of an adjacent lot in said square, also improved by a dwelling. The bill further alleged that the defendant, Carrie L. Munn, had commenc-

ed the erection of a brick addition to her said dwelling and that the work had so far proceeded that the foundation walls had about reached the level of the ground; that it was the intention of said defendant to erect said addition three stories in height, and that if permitted to proceed to completion said addition would operate to deprive the appellant of the light and air to which he claimed to be entitled. It was further alleged that the addition was being erected in violation of the building regulations of the District of Columbia and in violation of an agreement had by the appellant with the former owner of the adjoining property, upon which said addition was being erected, said former owner being the grantor of Carrie L. Munn.

The averment concerning the unlawfulness of the proposed structure would seem to be immaterial in the present proceedings, although the bill of complaint is set forth at length in the record, to which reference is respectfully made. The bill prayed that Mrs. Munn and the remaining defendants, her husband, the architect and builder, might be temporarily enjoined pending the suit from proceeding with the further erection of said addition and that at the final hearing such injunction might be made perpetual. On the day of filing the bill, the court below granted a rule to show cause why an injunction should not be granted as prayed, returnable on the 4th day of September following, "with the option to apply at an earlier date for hearing upon proper notice to counsel for complainant," and in the same order pending the hearing of said rule, the defendants were enjoined from continuing the erection of the addition to the building referred to. At the same time the complainant entered into an undertaking with sureties (R., p. 7) whereby they undertook "to make good to the *defendant* all damages by *him* suffered or sustained by reason of wrongfully and inequitably suing out the injunction."

ties, the appearance will be confined to those parties served with process.

Enc. Pl. & Pr., Vol. II, P. 600.

"Where there are several defendants, one of whom is not served, it will be held that an appearance by solicitor for defendants will be limited to those only who have been served."

Gardner v. Hall, 29 Ill., 277.

In Violet v. Waters, 1 J. J. Marsh. (Ky.), 303, the court said:

"As three were sued, the expressions quoted ['parties appeared, the defendants appeared,'] do not mean merely because they are in the plural that all three appeared. 'Defendants,' in the legal import of the term, means *those on whom process has been served.* As the writ was returned executed on only two, the legal construction of the style of the record is, that those two (who alone were defendants) appeared."

In Moores v. Parker, 3 Litt., (Ky.), 268, the court said:

"The record recites that the parties came by their attorneys * * * but such a recitation on the record we think ought not be construed into an appearance of the defendant not served with process and who, as appears in this case, is returned by the sheriff not found. The most rational inference from the recital is that the plaintiff in that court and the defendant who was served with process appeared by their attorneys."

In Clemson v. State Bank, 2 Ill., 45, the court said:

"The defendants' attorney, in a demurrer to the declaration, used the words 'defendants come by their

attorney, and defend,' etc., * * * Was here such an appearance on the part of Waters as compelled the plaintiffs to consider him in court? We think not. As Waters was not served, it evidently was a mistake on the part of the attorney in using a plural noun and verb, instead of a singular one,—and a mistake which the court would have permitted him to amend."

In Spangel v. Dellinger, 42 Cala., 148, the court said:

"Counsel appeared expressly for Reay and Ellis. His signature to pleadings, etc., after that time as the attorney for the 'defendants' will be construed as limited to those defendants for whom he expressly appeared."

In Chester v. Miller, 13 Cala., 559, 561, the court said:

"It is stated that the Attorney B. appeared for all the parties, Chester included and that this is evident by an answer to which his name is signed. But it is held that the recital of an appearance is never conclusive and where the expression is general *it is confined to those parties who have been served with process.*"

In Davis v. Whittaker, 38 Ark., 435, the court said:

"It is of the greatest importance that the record of every case should show clearly and beyond doubt, for all future time, who were parties and bound by the proceedings. Where there has been service the record should show it. Where there has been none, it should show an appearance; and where there are several defendants it does not suffice to say that 'the defendants' appeared. Such a term applies only to those who have already, by service or appearance, been made parties and does not include all who are named in the bill or

> complaint. It is better to name the parties defendant, who come by attorney, at least once, after which the term 'defendants' in subsequent entries may include them."

In Edwards v. Toomer, 14 Smeedes & Marshall, (Miss.) 80, the court said:

> "The recital of an appearance is never conclusive and where the expression is general, it is confined to those parties who have been served with process."

In Harrison v. Agricultural Bank, 2 Smeedes & Marshall, 311, a motion was made by the defendants, by their attorneys, to quash the writ. The question arose whether such an appearance was sufficient to bind the defendants. The court said:

> "We conceive that the appearance upon the motion had reference only to the parties in court by the process."

In Gifford v. Tucker, 2 Ill., App. 331, where motions were filed generally on behalf of defendants, though only one had been served with process, the court said:

> "We have examined the record carefully and are of opinion that there is nothing in it indicating a pur pose on the part of the attorney who appeared in the court below to enter the appearance of the appellants not served. * * * The fact that it appears that motions were made in the name of all the appellants * * * does not serve to give the court jurisdiction of the persons of the appellants not served with process."

It follows, as there was no appearance on behalf of Mrs. Munn, it was not a *defective* appearance, as intimated by

the Court of Appeals, which could be cured by an answer afterwards filed. Even if it were a defective appearance, the subsequent filing of the answer could not relate back so as to give a right of action on the injunction undertaking as of the date of the defective appearance. To hold that a person could avail himself of a defective appearance, if in his favor, and repudiate it if against his interests, would be grossly unjust, and we submit is not the law. Such would be the effect of permitting a party to correct or perfect an imperfect appearance, upon which he could not be held, and thereby secure a cause of action in his favor.

We submit, under the circumstances, it is undoubted, that the first appearance of Mrs. Munn was by her answer filed October 30, 1902. The restraining order was discharged November 21, 1902. The damages allowed cover a period long before and long subsequent to this period.

The evidence fails to show what portion, if any of the damages are attributable to the period that Mrs. Munn could, on any theory, be said to have been enjoined.

(B) PARTY BEYOND REACH OF PROCESS CANNOT RECOVER ON INJUNCTION UNDERTAKING.

The Court of Appeals undertakes to hold, although in Europe and beyond the reach of process of the court, that as soon as she heard of the injunction she was bound by it and that therefore she is entitled to a remedy on the injunction undertaking. We submit the principle asserted by the court below, and apparently sanctioned by the authorities cited, has no application to the case now before the court. Except only the reference in High on Injunctions, hereafter considered, the cases cited refer merely to the power of a court to *punish for disobedience of an injunction issued by it.* Necessity underlies the principle that knowledge alone of an injunction is sufficient basis for punishing its

violation. And this punishment may be inflicted upon a person not a party to the suit, as held In re Lennon, 166 U. S. 554, relied upon by the court below. But that does not mean nor does it hold that a person who is *not a party* to a suit, though he may be punished for *violation* of an injunction, will have a cause of action on the injunction bond merely because he *does nothing* that is forbidden by it. To give a cause of action on the undertaking, something more must exist than mere *knowledge* of the existence of the restraining order. The person restrained must also *be a party to the suit,* in the legal sense, and even if service of process or the order itself be not essential, yet the person restrained must have knowledge of the order and must do something or refrain from doing something, in obedience to the order, that results in damage.

The only suggestion against this contention that we have ever been able to find anywhere is that found in High on Injunctions, section 1677, wherein he bodily adopts the decision of a branch of the Supreme Court of New York, reported in 39 Barb., at page 16, and says:

> "The injunction bond being for the benefit of all the defendants enjoined, regardless of whether they are served with process, to entitle one to damages upon a dissolution, it is sufficient that he has *rendered himself obedient* to the injunction, although the writ may not have been served upon him, and he is then entitled to a reference to ascertain his damages."

The only case cited in support of this doctrine is that of Cumberland Co. vs. Hoffman, 39 Barb. 16, above referred to. In the first place, that was not a decision by the highest court of the state, but only by a department of the Supreme Court, consisting of three judges, and of these three, two concurred in the judgment and one dissented. No authori-

ties are cited in the opinion in support of the decision. Independent of the fact that the decision is contrary to reason and principle, independent of the fact that there were only two judges of a subordinate court in favor of it and one who dissented, still the case is clearly different from the case now under consideration. In that case *there was actual service of summons and of the writ of injunction,* although the court subsequently set aside the service on the ground that the defendant was a non-resident corporation, and although its officers were within the jurisdiction of the court and were served with process, yet under *the code* as the defendant had not property within the jurisdiction, the writ was improperly served. The Code was changed pending the suit. The majority of the court in its opinion said: "The court *had sufficient jurisdiction over the parties* to commence the action although there was none over the *subject matter.*"

In that case, *after service,* the defendant made a rigid observance of the injunction, and, under those circumstances, the majority of the court held the defendant was entitled to an inquiry as to damages sustained by the injunction.

In this case, the defendant was not even within the jurisdiction of the United States, much less the jurisdiction of the particular court, and neither subpoena nor injunction was served upon her. *When she was actually advised of the injunction and whether she was ever advised as to its exact terms, does not appear.* Nor does it appear that she did anything whatever in obedience to the writ. We have the naked fact, that while abroad, she heard in August that an injunction had been granted. *It does not appear that she even knew she was a defendant in the case.*

The undertaking given in this case, followed the rule of court, and provided that the complainant and his sureties "hereby undertake to make good to the *defendant* all dam-

ages by *him* suffered or sustained by reason of wrongfully and inequitably suing out the injunction in the above entitled cause, and stipulate that the damages may be ascertained in such manner as the justice shall direct, and that on dissolving the injunction, he may give judgment thereon against the principal and sureties for said damages *in the decree itself dissolving the injunction.*"

The judgment for damages was not embraced in the decree itself dissolving the injunction; by the terms thereof, the undertaking runs "to the defendant," in the singular, to pay "him" all damages sustained.

To avail one's self of the benefit of an injunction undertaking, there must be imposed the correlative liability to punishment for failure to obey. It is on this theory the courts have sustained punishment inflicted upon defendants for violation of injunctions, though such defendants were not served, but had actual knowledge thereof. But in all such cases, such defendants have *been within the jurisdiction of the court* and amendable to its process. But the defendant Munn in this case, was not amenable to the process of the court, and could not, even with knowledge of the injunction, have been punished for anything she did while abroad in violation thereof, and she remained abroad during the entire period of time covered by the injunction. The fact that she was not within the jurisdiction of the court makes a vital difference. And while it does not appear that she did anything to violate the order, on the other hand, it does not appear that she did anything whatever in obedience to it. Indeed, it does not appear even that she had knowledge of its terms. And damages can certainly be allowed only for what is done or what has been actually prevented *pursuant* to the injunction.

But it cannot be the law that one can by his or her own act, without service of process, as said in the dissenting

opinion in the case referred to, volunteer to come into court so as to claim the benefit of an injunction undertaking. The vice of such a theory is apparent. As actually happened in this case, the defendant Munn, without the knowledge of the complainant, acquired information of the injunction while abroad, but whether full information does not appear. She did nothing affirmatively to show to the complainant that she had such knowledge, or that she was submitting herself thereto. Is it possible under such circumstances, without the knowledge of the complainant, the defendant, while abroad, could, by her own act, be acquiring a right to damages against the complainant on the injunction undertaking? And if so, *from what date?* When did she first learn of the injunction? It does not appear. Was she entitled to damages between the date of the injunction, and the date when she first heard of it? Certainly she could not be entitled to damages for being enjoined, when she did not know she was enjoined? How is it possible that *she,* during such period, could do anything because of the injunction, or refrain from doing anything because of an injunction of which she had no knowledge? And if she did not, how then can she claim damages during such period? This clearly demonstrates the fallacy of the rule. Moreover, as the auditor has allowed damages covering the entire period, including the period during which Mrs. Munn did not even know of the pendency of the suit, the finding made by him cannot possibly be right.

(c) UNDERTAKING TO BE STRICTLY CONSTRUED.

The injunction undertaking must be strictly construed, in favor of the sureties, so far as the extension of their liability is concerned, even though it be liberally construed in reference to matters and persons clearly comprehended within its scope. The injunction undertaking refers gen-

erally 'to the defendant," in the singular. Which defendant? Obviously, it must mean the defendant enjoined. If there be two defendants, one enjoined and one not, though both within the term "defendant," the one not enjoined could certainly not claim the benefit of the undertaking even though he fully submitted thereto. And there can be no difference in principle, where the order enjoins all the defendants, but no service is had upon certain of the defendants, who are not within the jurisdiction of the court, have not entered their appearance, and are therefore not bound thereby.

We respectfully submit Mrs. Munn has no right to the enforcement of the undertaking in this case. And if entitled to enforce it at all it can only be for the period between the date of filing her answer and entering her appearance on October 30th, and the date of dissolution of the order, several weeks later, and as no damages are shown to have been incurred, attributable to this period merely, there can be no recovery whatever.

On this head, and supplementing what has been heretofore said, the case of Eakle vs. Smith, 27 Md. 467, may be cited. In that case the Court of Appeals of Maryland held there could be no recovery on an injunction undertaking where no actual restraint occurred. The argument of Chief Justice Alvey is in point.

In Steuart vs. State, 20 Md. 97, the court lays down the rule that a suit on an injunction undertaking can only be maintained by one whom the injunction has deprived of some vested legal right.

Mrs. Munn was never enjoined. An injunction does not float in the air. She certainly was never enjoined until she knew of it, and when that was the defendant has failed to show. An injunction operating upon some one wandering around Europe, whose whereabouts are unknown, is a legal anomaly. The liability on an injunction undertaking, par-

ticularly as against the surety, is strictly construed. So construed, there is no liability whatever to Mrs. Munn. Her remedy is against the builder for the delay in completion, and the remedy of the builder, who was enjoined, is on the undertaking for the amount of damages he might or may have been required to pay. That is the proper procedure and the proper measure of liability on the undertaking. Supporting this view is the leading English case of Smith vs. Day, 21 Ch. Div. 421, cited hereafter in this brief.

We, therefore, submit the decree in favor of Mrs. Munn is erroneous.

## FINDINGS OF AUDITOR NOT CONCLUSIVE.

The findings of the auditor concurred in by the court below under the rulings announced by this court conclude the appellant upon many matters of evidence urged as error in the court below, and which therefore are not urged at the present time. The principle announced by this court however, is that such findings are merely to be taken as presumptively correct and will not be permitted to stand if some obvious error has intervened in the application of the law or if some important mistake has been made in the findings and which has been clearly pointed out and made manifest. Nor does the principle have any application *where there has been no finding by the Auditor*, upon matters to which his attention was directed and which, if found, would have defeated the defendant's right of recovery. In several particulars we believe this case comes within the qualification of the rule under consideration; that is to say:

*First*: An important mistake has been made and was clearly pointed out before the auditor and the court below, in allowing damages which, by reasonable precaution or exercise of reasonable diligence could, to a large extent, have been avoided.

*Second*: An important mistake has been made and was clearly pointed out in holding that the entire house was uninhabitable and allowing damages for its rental value when the evidence showed that the house was inhabitable or could have been made so in a very short time at nominal cost.

*Third*: In failing to make any finding whatever upon the evidence which showed that the defendant failed to exercise reasonable diligence in having the restraining order discharged and in disregarding the prnciple of law that such lack of diligence prevented recovery for the period covered by such unreasonable delay.

*Fourth*: In failing to make any finding whatever upon the evidence which showed that the loss sustained was not due solely to the effect of the restraining order, and disregarding the principle of law that under such circumstances the defendant could not recover.

*Fifth*: The auditor and court below erred in the application of the law to the evidence, (*a*) in allowing a season's rental for the house and, (*b*) in taking the rental value of the main house as the basis of the allowance.

These several matters will be considered in the order stated.

## ONE CANNOT RECOVER ON AN INJUNCTION UNDERTAKING FOR AN INJURY WHICH HE MIGHT BY REASONABLE PRECAUTION OR EXERTIONS HAVE AVOIDED.

The law is well settled that one cannot recover damages on an injunction undertaking, for an injury which he might by reasonable precaution or exertion have avoided, or which by reason of lack of reasonable diligence, have been unreasonably increased.

Sedgwick on Damages, Sec. 105.
Mack vs. Jackson, 9 Colo. 537.

"The doctrine of nonliability for avoidable consequences applies to actions on injunction bonds, and any damages resulting from the failure to use reasonable exertion and care are not recoverable. There cannot be a recovery for the expense resulting from idle men and horses unless it is shown that an effort to find employment for them failed."

Sutherland on Damages, last ed., Sec. 526.

In Alliance Trust Co. vs. Stewart, 115 Mo. 245, a suit on an injunction bond, the court said:

"In other words, in order to save his debt, plaintiff was bound to find some one who would pay the amount in consideration of acquiring the equity of redemption in the land. Whether such a person could have been found was entirely too speculative and conjectural to make the bare possibility of doing so, a rule for the measurement of his damages. * * Moreover, one sustaining damages from the act of another should not stand by and allow damage to be incurred, which, *by reasonable exertion or cost* on his part, might have been averted. He cannot recover for damages thus permitted."

"As it is the duty of a party injured by a breach of contract or tort to make reasonable effort to avoid damages therefrom, such damages *as might by reasonable diligence on his part have been avoided* are not to be regarded as the natural and probable result of the defendant's acts. There can be no recovery therefore for damages which might have been prevented by reasonable efforts on the part of the person injured."

Am. & Eng. Enc., Vol. 8, page 605, and the great number of cases there cited.

The Supreme Court of the United States in Warren vs. Stoddart, 105 U. S. 224-230, held:

> "The rule is, that where a party is entitled to the benefit of a contract and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent."

The efforts which the law requires of a person injured to avoid what damages he can, includes the making of reasonable expenditures to such end.

Am. & Eng. Enc., Vol. 8, page 606 and cases cited.

In Sutherland on Damages, last ed., Sec. 88, it is stated:

> "The law imposes upon a party injured by another's breach of contract or tort, the *active duty* of using all ordinary care and making all reasonable exertions to render the injury as light as possible. If by his negligence or willfulness, he allows the damages to be unnecessarily enhanced, the increased loss that which was avoidable by the performance of his duty, falls upon him."
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> "The *reasonable cost* of the measures which the injured party is bound to take to lessen the damages, whether adopted or not, *will measure the compensation* the party injured can recover for the injury or the part

of it that such measures have, or would have prevented."

And that is the rule of law supported by reason and by very many decisions, and is, we believe, unquestionable. The application of the rule to the present case will wholly prevent the recovery of any damages.

(A) APPELLEE INDIFFERENT TO CONSEQUENCES.

In many respects this case is remarkable. The Munns were obviously people of wealth, who spent their time abroad or in this country, at pleasure. Necessity did not bring them to Washington to occupy the house mentioned in these proceedings. It does not appear that they suffered the slightest inconvenience because of their failure to get possession of their house in the spring of 1903. It does not appear that they did one solitary thing or exerted one single effort, wrote one single letter, made one single complaint, or, in short, did anything whatever to expedite the completion of their house or to do anything whatever to lessen the damages they claim were resulting from the issuance of the injunction. They were abroad when this work was begun, and a resident, who believed Mrs. Munn's action was invading his rights, was unable to get service of process upon her. An early hearing was had, and if the case had been disposed of then no trouble or expense or delay would have been incurred. But the court itself, to which we invite attention, refused to disturb the order very naturally until Mrs. Munn should file her answer. Yet in a most leisurely manner, and at his and her own convenience, when they understood the disposition of the injunction depended upon their own diligence, they filed an answer about *two months thereafter*.

Now, we have referred to this to demonstrate that the

Munns did nothing whatever to expedite the work or hasten its completion or to relieve themselves from the injunction or its effects.

Their architect, to whom the work was committed, and the contractor, not being urged, became affected with the same feeling of indifference and did nothing whatever, They made no effort whatever to hasten the work or to overcome the obstacles that stood in the way of the occupancy of the main house, if the Munns wished to occupy it. Indeed, it does not appear that they even wished to do so. It appears in a hazy way, that if completed, they expected to return to Washington and occupy the house, but when does not appear. It looks very much as if they were entirely content to let the matter rest so long as they had a good undertaking behind the restraining order. The net result is, that while permitted to remain abroad and enjoy themselves, and permitting the architect to do the work in the most leisurely manner, Mrs. Munn has *been allowed as damages* $6,000, while the total cost of the addition, including ball room, including alleged extra charge of the architect, the commission of the contractor, etc., was only $6,900. In other words, by their utter indifference they were having their building paid for, and, if further protracted, would have left them a surplus. To sustain such a result, the right must be plain. On the contrary, we submit, the right is not only not plain, but distinctly negatived.

### (B) LACK OF DILIGENCE ON BRICK WORK.

Now, let us glance for a moment at the situation as it existed at the time the injunction issued. The foundation of the addition had been laid and the foundation walls had been raised about three feet. A small corner of the west wall, which opened into the rear parlor, had been re-

moved, but had been inclosed fully. This was the situation. *After the injunction* more of the walls were removed and also the bay window. After the injunction issued, the architect and builder appear to have been quite content to let the injunction matter rest. They do not appear to have been annoyed in the slightest by it. So far as the record is concerned, it does not even appear that they made a single inquiry as to the time when it would be disposed of. This situation continued until about the middle of November, when the order was discharged. After the discharge of the order, they proceeded with the brick work, and while the date of completion does not appear, it does appear from the testimony of the builder that the entire addition was under roof *before the severe weather set in.*

Now, our first claim is, that this delay in the completion of the brick work, after the dissolution of the injunction, was wholly unnecessary and due to lack of diligence on the part of the defendants.

To sustain this delay, the architect undertakes to say the weather was too cold to lay brick, and that brick cannot be laid in the District in weather when the temperature, at night, falls below freezing point. Yet, on cross-examination, this gentleman admits, what everybody knows, that *it is safe to permit a wall to be erected in winter*, although the temperature occasionally falls below 20 or 25 degrees above zero, provided they do not lay the brick in extremely cold weather, he says he would consider it safe (pp. 47 and 48.) The records show that the temperature did not fall below 20 degrees until the close of the month and after the addition was under roof. (p. 71.)

William P. Lipscomb, the builder, says bricks *are* laid when the temperature is above freezing in the day time and below freezing at night, for the reason that bricks, being

dry, take the water out of the mortar, and it is the water in the mortar that freezes (p. 34).

B. B. Bradford says there is no reason why they could not have gone on with the brick work when the cold weather set in, particularly if they had used cement in the mortar, and for that purpose only four barrels would have been required on this work, at the rate of four dollars per barrel. On a southern exposure you could lay brick even though the temperature was as low as 9 degrees (pp. 58 and 59).

James Hughes, a brick contractor in Washington for 30 years, says if you use fresh mortar and the bricks are dry, it will not hurt to lay brick work in the day time when the temperature rises above freezing, though the temperature at night falls as low as 20 degrees, and he gives details showing that he did work of that kind during the same winter that the Munn house lay idle, under much more difficult conditions (pp. 60 and 61.)

John L. Smithmeyer, an architect of great experience, says brick work can be done in cold weather if there is any reason for doing it, and that he did a great deal of brick work on the Georgetown College in midwinter. (p. 63.)

Bradford, on being recalled, said that at the time of testifying, December 30th, he was building a residence of his own, and that he was laying brick right along, though the temperature had gotten as low as 18 degrees F. at night, but he used cement in his mortar (p. 64).

Supplementing this testimony by common sense and common knowledge, it is known that a great many building operations are carried on in Washington in the winter time, the idleness of this particular enterprise during November and December irresistibly force one to believe that the failure to prosecute this work was due to indifference or gross carelessness, for which this complainant cannot be held responsible.

(c) BUILDING SUBSTANTIALLY IDLE BETWEEN DECEMBER AND MARCH.

Our next proposition is, that the *long delay* between the setting in of cold weather in December, and the beginning of the plastering in March, *was exclusively and wholly due to carelessness, indifference and lack of diligence* on the part of the architect and builder.

While, as we have shown, the brick work could have been completed much sooner than it was, nevertheless, after it was completed, there was no reason whatever that the building should not have proceeded to completion.

The contractor says he planned to complete this building in four months, which would have brought its completion to the middle of November. He had proceeded as he says a month and a half, which would have left two and a half months for doing all the work that remained to be done after the injunction issued. The injunction was dissolved on November 21st, and the work was not finally completed until in April. Bradford says he would guarantee to do the whole work in three months from beginning to the end. Smithmeyer, says the addition ought to have been finished in 60 days. (p. 64.) We assume, that so far as the complainant is concerned, reasonable diligence would be expected of the defendants, and this we insist was not given.

Now, the architect and builder both admit that the brick work was finished, the house was completely under roof and completely enclosed, when the cold weather set in. What then prevented them from proceeding with the plastering? Two whole months it lay idle without a thing being done in the way of plastering and without even getting the building ready for plastering. It is not too strong to characterize it as absurd when one says, that when a building is actually enclosed, the work on a dwelling in the District of Columbia, must be wholly suspended on account of such

weather as is common in the District or actually existed here during the time this work lay idle.

The testimony does not justify this idleness.

Take the defendant's own witness, William P. Lipscomb, who did the work, says "they do plastering in Washington in the winter by enclosing the buildings and heating them." (p. 22.) That is the *practice here. Plastering can be done in freezing weather by heating the house.* Q. Was this addition in a condition that it could be enclosed and the plastering done ? A. *Yes, it could have been done,* at an extra expense. (p. 33.) I think this plastering was put on sometime in March or April, think April.

Thomas M. Walsh, the man who did the plastering, says he did not begin lathing till *February* 14th, and did not begin plastering *till March* 4th, and finished it 31st of March. (p. 34.) Have done plastering in winter in Washington by using steam or salamander heat; steam and hot water heat are all right and work can be done under those conditions *and I do not know why it was not done in this case.* The work *was not supposed to be ready.* As soon as it was ready for lathing I went in. (p. 35.)

Walsh could not begin lathing and plastering, not because of the cold weather, because he says plaster could be laid in freezing weather and he does not know why it was not done in this case; but because, as he says, *the work was not supposed to be ready;* and Lipscomb says the carpenter work was suspended because the plastering was not done. (p. 34.) Each waited on the other. What a ridiculous spectacle. And yet even Lipscomb, the contractor, says the plastering work could have been done at an extra expense, presumably the trifling cost of salamander heating or fire in the furnace.

Even Hill, the architect, admits, (p. 48), that there are apparatuses for heating in order to do plastering but he

says they are *apt* to discolor the wall; that it can be done but it is not as good as to have natural drying! it dries out the plaster but not so well as natural drying; when they have no other mode of heating *that is the customary mode pursued in structures put up in winter.* We respectfully ask, why he did not adopt that course in this case? He says because a salamander would discolor the wall. The other witnesses deny it. Even his own witness, the man who did the plastering, says it was customary to use salamanders and that he does not know why they were not used in this case. The complainants witnesses expressly testify that it is customary to do so and that it does not discolor the walls.

But taking the statement of the architect, which is obviously as far in favor of Mrs. Munn as it was possible for him to go, we find him admitting that the work could have been done, even without the alleged discoloration, by the use of steam or other heating apparatus. But he says it was not possible to turn on steam in the main building because there was no apparatus in that portion of the house. (p. 48.) This answer may mean anything. We confess we do not know just what it is intended to mean. But he goes on and says he could not have completed the heating plant in this particular building because the entire building was not completed. Again, working in a circle. The plastering and carpenter work could not be done until the heating plant was put in, and on the other hand the heating apparatus could not be put in, as the architect says "until the entire building was completed." All of which is a novel way of constructing a building. (p. 48.) On the same page, he first says the new heating plant could have been completed, and then he supplements it later by saying, with the exception of the joining at the end where it was connected with the new addition. He further says (p. 49) that it was not pos-

sible to heat the addition from the furnaces in the main building. Why, we cannot see and the answer does not accord with reason. Mrs. Munn says, (p. 24,) that the house had "good heating arrangements, *very good.*" The defendant's witnesses say the walls from the old building, connecting with the new building had been removed. The new addition was completely enclosed before the cold weather set in. *No fire was ever made or attempted to be made in the furnace* in an effort to heat the old building or the new addition. Mrs. Munn says her furniture was damaged because this was not done as the house got damp. (p. 28.) Now, under these circumstances, we respectfully submit, that due diligence was not exercised on the part of Mr. Hill; on the contrary, he exhibited no diligence, but the grossest of indifference. It does not appear that he even visited the premises after the injunction issued and until it was dissolved. We claim therefore, in the language of the authorities cited, that "any damages resulting from the failure to use reasonable exertion and care are not recoverable;" and in the language of one other authority, "in order to sustain damages from the act of another, one should not stand by and allow damages to be incurred which, *by reasonable exertion or cost* on his part, might have been avoided." And as this long delay was due to lack of reasonable exertion and care and might have been avoided by the exercise of reasonable exertion or cost, that the damages were improperly allowed.

Mr. Walsh, who put on the plaster, moreover, says he began the lathing on February 14th. Now this three-story addition, as it appears, was only 12 feet 6 inches wide by 32 feet in depth, (p. 11), and yet *it took from February* 14th to *March* 4th, to lathe it; and *from March* 4th to *March* 31st, to plaster it. Just to think of this diligence! A house 12 feet 6 inches wide by 32 feet in length, three stories

high, took three weeks to lathe and as much longer to plaster! Can it be possible that this shall be regarded as due diligence?

The auditor, in his report, by implication at least, sustains the contention that reasonable diligence in the prosecution of the work was necessary, but he says that Mrs. Munn employed an architect and builder, both of whom were qualified, and that he "must hold that she was justified in submitting to their judgment the question of when the work should proceed, having due regard to the weather conditions and other circumstances. I do not find the claimant Mrs. Munn to be responsible for unreasonable delay in the prosecution of the work after the dissolution of the restraining order." Now it will be observed the auditor does not find that there was not unreasonable delay; he merely holds that Mrs. Munn is not "responsible for unreasonable delay in the prosecution of the work after the dissolution of the restraining order," because, as he says, she employed an architect and builder, competent in their respective callings. That is to say, he lays down the rule that Mrs. Munn is not responsible because she was away and *left the matter to an architect and builder, and even though there was unreasonable delay in the completion of the work, she is not responsible for it.* Is not that a remarkable doctrine? The architect in this case was entrusted with the entire work. She vested him with full authority. He stood completely in her place with reference to this work. When she undertakes to claim damages therefore, is it not admissible to show by way of reduction thereof, that her agent, who had charge of the work, failed to do his duty? We submit that so far as the complainant is concerned, and his liability on the bond, it does not matter which one of the defendants is responsible for the unreasonable delay and lack of due diligence in the completion

of the work, he is entitled to show that the delay was not caused by *his* act and by the *injunction* granted at his request. Mrs. Munn claims it was the act of the complainant that caused the delay. We answer, it was the acts or neglect of the employes of Mrs. Munn, her architect, and builder that caused the delay, and not the injunction. We therefore submit with the utmost earnestness, that the auditor erred in applying the principle stated. We also emphasize the fact that the auditor has not passed upon the question *whether there was in fact due diligence in the prosecution of the work.* He holds Mrs. Munn's claim cannot be reduced even if there was, it appearing she committed the work to competent men. As an open question therefore, we submit, the evidence in this case, demonstrates the fact that due diligence was not exercised in the prosecution of the work and that therefore the allowance of damages was improper.

On the second reference the auditor found that there was a delay of 30 days in the completion of the house, due to lack of diligence on the part of Mrs. Munn's agents, though he makes no difference on account thereof in the allowance of damages. Does not this tend to demonstrate the injustice of the rule as to damages applied by him, when we find the plaintiff is required to pay damages for inability to use the addition during a period when the owner herself and her agents were negligent in the prosecution of the work? We insist, however, that the negligence extended to other work besides lathing and plastering, and was very much more, and the evidence makes this conclusion irresistible.

The auditor says, with reference to the brick work, that it was completed within six weeks after the injunction was dissolved, and says that view is supported by the testimony of one of the witnesses of the plaintiff. But that is not the

only evidence in the case. The defendant's witnesses, particularly her architect, undertake in their evidence *to excuse the delay in completing the brick work,* AFTER the injunction was dissolved, by alleging the weather was too cold for that purpose. The claim with reference to the weather was not sustained, and it, therefore, follows certainly, that even though it did only take six weeks to complete the brick work, it was much *more than necessary,* else why undertake to excuse the delay, and why claim there were delays because of the weather when that claim is not sustained? But we are not to shut our eyes to reason and common sense. This building, or addition, was 12 feet by 32 feet only, and three stories high. They were working on the brick work for nearly six weeks before the injunction issued, and worked on it six weeks after the injunction was dissolved, or twelve weeks in all, a total of three months, on brick work for a building 12 feet by 32 feet? Does it need argument to show how unreasonable it was?

But that fact has another bearing. The work was begun on July 1st, and had progressed, under most favorable conditions, without restraint, and in six weeks had gotten even with the ground! This continued until August 14th, when the injunction issued. It had then progressed a month and a half. The defendant's contractor says he "expected" to complete the building in four months from beginning to end. Smithmeyer says the whole work could have been done in sixty days. The work was arrested by the injunction until November 25th. From that time there was no restraint, and nothing whatever shown by the evidence, to interfere with the orderly and regular prosecution of the work (except defendant's negligence) and yet it was not finished until about the middle of May. The work, taking the builder's estimate of time, should have been completed within two and one-half months from November

25th, or about February 10th, and yet it was not completed until the middle of May. The auditor has found that thirty days of this time was wasted by the defendant's agents. Deducting this thirty days of wasted time, would leave the building, according to the auditor's finding, as having been, or as it should have been completed, by the middle of April. But how about the balance of the time, between February 10th and when it should have been completed according to the builder's estimate and the middle of April? There is no finding that this was due to cold weather or to any cause attributable to the injunction. This certainly makes two months additional delay due to the lack of diligence on the part of the builder and her architect. Is not the conclusion absolutely irresistible that if the whole work could have been done in three months, as the plaintiff's witnesses say, or in four months as the defendant's builder says, that it was gross negligence to actually occupy seven and one-half months to do the work? The additional time was not occasioned by anything attributable to the injunction. There is no such finding, nor is there any such evidence, and yet the burden rested upon Mrs. Munn. In this she has failed. Indeed, her own evidence proves the contrary. And if all that is not true, is it then not absolutely certain that the builder's estimate of the time it would take to complete the building altogether out of the way? It took six weeks on the brick work before the injunction and six weeks after, or a total of twelve weeks, about *three* months, *for the brick work alone*. Did he expect to do all the rest of the work in one month, for which he in fact took four and one-half months? And if he is mistaken in his estimate of time, is not then Mr. Hutchins being wrongfully charged for time that was not in any sense attributable to the injunction?

## LACK OF DILIGENCE IN HAVING INJUNCTION DISCHARGED.

And the same rule of law, imposing upon a defendant due diligence in efforts to lessen damages, imposes upon him the *duty of taking reasonable steps to relieve himself of an injunction,* if thereby the damages may be materially lessened.

Sutherland on Damages, last ed., section 524, lays down the rule in this manner:

> "Where an injunction has been improvidently granted or obtained without good cause, *the defendant should take seasonable steps to relieve himself from its operation and thus prevent damages.*"

This rule was not observed in this case; on the contrary there seems to have been an utter indifference to the whole matter. A sort of feeling, we will make the complainant pay for this, seems to have influenced the course of all of the defendants.

Let us refer to the record for a moment. The bill was filed August 14th. On the same day a temporary restraining order was obtained and a rule to show cause issued. The answers of the defendants, Hill and Lipscomb, were filed August 27th, thirteen days after the writ issued. The rule was returnable September 4th, but expressly provided that the defendants might apply at an earlier day for the dissolution the injunction. A hearing was had upon the rule, but as no answers had been filed on behalf of the principal defendants and no appearance had been entered in their behalf, the court declined to act upon the matter until the answers of the Munns were filed. (Rec., p. 43.) Mrs. Munn was in Europe at the time, but says she heard of the injunction in *August.* The answer of the defendants was

executed in New York on *October* 8th, 1902, but was not filed till *October* 30th, 1902. Although advised that the court would not pass upon the injunction until the answers of the principal defendants were filed, it was nearly three months before the answer was placed on record. And this answer, though executed in New York on October 8th, was held till October 30th, before filing, and it was not for several weeks that a hearing was secured, and not till November 25th, that the injunction was dissolved. If the rule of law is, as stated by Sutherland, that the "defendant should take seasonable steps to relieve himself from its operation and thus prevent damages," then the defendants did not comply therewith, and they are responsible for the damages that were incurred in the mean time; and yet Mrs. Munn has been allowed the rental value of her house during this period. We claim this was error.

## LOSS CLAIMED AND DAMAGES ALLOWED NOT DUE SOLELY TO EFFECT OF INJUNCTION.

To sustain the finding of the auditor it must appear that the condition of the Munn dwelling, which prevented the occupancy, was due to work which had been done previous to the injunction and the completion of which was suspended thereby. In other words, to sustain that finding it must appear that his was the *sole* cause, and that nothing that was thereafter done by the defendant Carrie L. Munn, or her agents, without regard to the injunction, contributed to that end. By reference to the testimony of Mr. Hill, the architect, having complete charge of the work, we find he says "there was work being done during the time of the injunction in the ball room that was not covered by the injunction, a one-story addition, and in order *to make that addition, the walls were torn out before the injunction was*

*issued."* (p. 44.) He says these walls were exterior walls; that prior to the injunction only part of the west wall had been removed, but *after the injunction, this* (indicating another part of the wall) *was taken out.* "I am under the impression these were taken out at the time of the injunction; that is, from here to here (indicating); that is, *they were taken out irrespective of the injunction. The bay window was removed subsequent to the injunction.* (pp. 44 and 45.) Walls a and b were removed either previous to the injunction *or without regard to it.* (p. 45.) *None of the walls covered by the injunction had been removed at the time the injunction was issued.* (p. 46.) Again on page 46, he says the work on the walls proceeded without reference to the injunction. (p. 46.)

William P. Lipscomb, the man who had the contract for the building of the addition, and who actually did the work, says the ball room was to have *been finished after the Munns returned from Europe and that it was not finished until then.* (p. 67.)

The injunction granted was limited specifically to the further erection of the three-story addition mentioned in paragraphs seven and ten of the bill. It did not restrain the erection of the ball room. The architect says, (p. 44), he knew that in addition to the three-story addition, the erection of which was restrained, there was other work to be done, to wit, the construction of a ball room that was not enjoined. The architect says, page 44, "there was work being done there during the time of the injunction *in the ball room that was not covered by the injunction, a one-story addition, and in order to make that addition, the walls were torn out before the injunction was issued."* He further says these walls were exterior walls and that prior to the injunction only part of the west wall had been removed, but *after the injunction this* (indicating another

part of the wall) *was taken out.* "I am under the impression they were taken out at the time of the injunction; at least, *they were taken out irrespective of the injunction,* that is, from here to here" (indicating.) By Mr. Maddox: What do you mean by from here to here? A. The northwest corner."

Now, this absolutely shows, from the defendant's own witnesses, and particularly from the testimony of the man to whom the entire matter had been committed, that there was work to be done there that was not affected by the injunction, to wit, the erection of a one-story addition for a ball room; that this work was begun before the injunction issued; and as Lipscomb, the builder says, this ball room was not to be completed until after the Munns returned and that it was not in fact completed until after their return, which was in April or May, though the rest of the house was completed at that time. (p. 67.) *And in order to do this particular work, the walls were torn out,* partly before and partly after the injunction, at all events as the architect says, *irrespective of the injunction.* This conclusively and absolutely demonstrates the fact that the condition of the house, the main house, which they say was rendered uninhabitable, was not so rendered because of the work that was enjoined, and that being so, it was obvious error to allow damages on the theory that it was so.

Now, as appears from the injunction order, taken in connection with the bill, the defendants were merely restrained from extending the west wall so as to interfere with the light and air of the complainant. Mr. Hill, the architect, who admits he did not know what the injunction was, on his direct examination (p. 43) says in the interval of the injunction no work was done on that addition, but says there was work prosecuted after that in the ball room that was not interfered with by the injunction (p. 44). But

on cross-examination (p. 46) he says they had removed the walls and put in the supports for the brick work above at the time the injunction issued, "but the work proceeded without reference to the injunction *except the work of making the connection*" (between the new and old buildings). Then the injunction did not arrest the work. This is also suggested by the testimony of Mr. Lipscomb, the builder, who, on being asked (p. 32) why the men were not continuously at work, says "Because the *work was not there to do* in the first place." The same suggestion appears in the testimony of the plasterer, Mr. Walsh, who says (p. 35): *"The work was not supposed to be ready"* that is, not ready for the plastering, and this was the situation until February 14th, when he began to lathe.

This testimony certainly shows that the suspension of the work was therefore not because of the injunction.

It also shows that other work was being done not affected by the injunction in the house. *This would have prevented the use of the house by a tenant or by the Munns themselves,* unless they had used the parts of the house unaffected. And this particular work, the ball room, was evidently important work, because, though begun when the other work was and before the injunction, and though kept on regardless of the injunction, not being affected thereby, they did not expect to complete it until after the Munns returned from Europe, and, in fact, it was not completed until after their return and after the main building was completed. (Lipscomb's testimony, p. 67). The work suspended by the injunction *was, therefore, not the work, at least not the sole work, that was to have been done during the absence of the Munns and that interfered with the possession of the house.*

We, therefore, earnestly submit that the uninhabitable condition of the main house, if it was in fact uninhabit-

able, which is not satisfactorily shown, was due to the work on the *ball room*, either wholly or substantially so, and for that reason no recovery can be had.

The finding of fact made by the auditor in his first report (R., p. 20), and not excepted to, and, therefore, to be taken as conclusive, would seem to completely demonstrate that it was not the injunction or the inability to proceed with the work enjoined that rendered the house uninhabitable. It will be borne in mind constantly that besides the work enjoined upon the three-story addition, the defendant was at the same time constructing a one-story addition for a ball room, the erection of which was not enjoined and work upon which proceeded without reference to the injunction, and that it was in order to do this particular work that the walls had been removed. It will be further borne in mind that this work and other work not enjoined proceeded without reference to the injunction. Now, this work not enjoined was in the dwelling itself, and it was this work that rendered the dwelling uninhabitable. This seems conclusively established by the report of the auditor itself. It will be remembered that Mrs. Munn claims an allowance of $1,500.00 damages for injury to the furniture in the dwelling. She gave evidence tending to show that the furniture and hangings in the dwelling were seriously damaged and that it would cost $1,500.00 to restore the same. She testified further that upon her return she found the house badly damaged by the exposure of the premises, resulting in an accumulation of dust, which damaged the decorations, pictures, furniture, curtains and carpets; that she employed a decorator to remove the furniture and draperies and that his bill amounted to $1,500.00. Now, this fact we deem of very great importance. As she says, the interior of her dwelling was badly damaged, and yet, admitting this to be true, the auditor found (R., p.

20) that the evidence *does not show that any part of this alleged injury was the result of the restraining order* and he further found that the enjoined work was suspended from August 15th to November 25th, *"while other work upon the property was carried on which was more likely to cause the alleged injury than that covered by the order."*

We have, therefore, a finding that other work was being done in the dwelling, notwithstanding the injunction and during its pendency. We have a finding that this other work that was not enjoined did the damage to the house. Mrs. Munn said the house was badly damaged. The auditor finds that though badly damaged, it was caused by work progressing during the continuance of the restraining order, but not covered thereby (R., p. 28). We submit that this is a conclusive finding that the house was not rendered uninhabitable because of the injunction. It was the duty of the defendant, in order to recover, to show that the damages sustained were due exclusively to the injunction and not to anything else. Having utterly failed in this regard, indeed, the testimony having shown that the damage was due to causes other than those produced by the injunction, she cannot recover.

## ALMOST THE ENTIRE HOUSE WAS INHABITABLE DURING THE ENTIRE SEASON, OR COULD HAVE BEEN MADE SO IN SHORT TIME AT NOMINAL COST.

We have shown that the condition of the main building was not wholly due to the suspension of the work on the three-story addition, but by reason of the construction of a one-story addition for a ball room, to do which the walls had been removed, and which was not completed until after the Munns returned in the spring though begun before

the injunction was issued and was not affected thereby. Yet assuming, that the condition of the main or old building was in fact and wholly due to the suspension of the work on the three-story addition by the injunction, nevertheless we claim that almost the entire house was inhabitable during the entire season, or could have been made so in a short time at nominal cost.

The house had 21 or 22 rooms, not counting the small rooms, but counting the living rooms only. (p. 24.)

The architect says the walls removed on the west opened into the back parlor. (p. 43.) The removal of the bay window that opened into the front parlor was not affected by the injunction.

Now this part of the wall removed was removed before the injunction issued, in August. The only room of the 21 or 22 rooms affected was the back parlor alone. Under such circumstances, is the complainant to be held responsible for the failure of the Munns to occupy the remaining 20 or 21 rooms, not counting the small rooms? Is that the extraordinary measure of liability to be applied to the complainant in an injunction suit? Such strictness is not to be applied. Rather, a liberality. The complainant believed he had a good case. The court apparently thought he made out a prima facie case and granted him the injunction. *Is then his measure of liability so strict that he is to pay for the use of 21 rooms because the use of one, two, or even three rooms out of 22 is interfered with?* But if any doubt exists on the subject, at page 58, when counsel for complainants undertook to interrogate the witness as to the condition of the residue of the house and its fitness for occupancy, counsel for Mrs. Munn admitted that the *Munns could have lived in there*, adding, "in some portions of it." Now, the only portion that was interfered with by injunction restraining the construction of the addition was

the rear parlor, as we have shown. Mr. Maddox, the attorney for Mr. Munn, admits the Munns could have lived in there, in some parts of it, to use his language; that taken in connection with the facts stated, must be construed to mean, they could have lived in the 20 or 21 rooms of the house not affected by the injunction. Are they then entitled to compensation for the whole house because they could not use one, two or even three rooms? We respectfully submit not.

Going a step further, we have shown by the authorities that no allowance can be had for damages which, by reasonable exertion or cost, on the part of the person complaining, might have been avoided. Now, at the time the injunction issued in this case, but a small part of the west wall had been removed. There was nothing whatever to prevent the restoration of this portion of the wall, at small cost, and within a few days, and thereby permit the entire Munn house to be occupied. Yet, nothing whatever was done to relieve the situation of loss; on the contrary, after the injunction, or as Mr. Hill, the architect, says, irrespective of the injunction a larger or additional part of the wall was removed. Instead of reducing the possibility of damage it was increased. When we consider that the injunction merely restrained the erection of the addition, and did not restrain the use of the main building, it is apparent that the defendant, by the exercise of even ordinary care and energy, and the expenditure of a small amount, could have made habitable the rear parlor, the only part of the main building which appears to have been affected by the erection of the three-story addition, and the failure to do so, under the authorities, prevents the recovery of damage.

Again, Mr. Hill was asked if the contract for the building could not have been completed with the exception of the extension of the west wall and the bay window in

front, and he says no, and when asked why, admits it could be done but not without entailing considerable extra work. But he admits he could have done it. And being able to do it, it was his duty to do so, so far as the complainant is concerned, and if he had, the measure of damages would merely have been the additional expense. The answer of Mr. Hill referred to is found on page 46 of the record. The authorities quoted expressly state if the damages can be avoided by care or additional expense, the care must be given or the additional expense incurred, and such additional expense can be recovered. But the whole truth of the matter, which explains the remarkable indifference to this whole matter, is found in the statement of Mr. Hill. Now, it will be remembered the Munns were abroad. They went abroad before the work was begun and committed the entire matter to Mr. Hill. It was he, as the vice-principal, who controlled the work, started it and stopped it—mostly stopped it. And it is through him Mrs. Munn undertakes to maintain her claim for damages resulting from the injunction. And yet, this architect and person in charge, when asked if he was not only enjoined from building the west wall says: *"I do not know what the injunction was."* (p. 47.) And yet, without knowing what the injunction was, he arrested the entire work, made no effort to do what work could have been done during the continuance of the injunction, and was positively indifferent to the work after the injunction was dissolved. We submit these facts establish the fact that the greater part of the house was habitable during the entire period, from the beginning of the work to its completion, and that the whole house could have been made habitable before the expected return of the Munns at nominal cost and the failure to put it into such condition bars a recovery.

## THE AUDITOR ERRED IN ALLOWING FOR A SEASON'S RENTAL OF THE MUNN HOUSE.

The auditor found as a fact that the rental value for a year of the Munn house was eight thousand dollars, and he found that *three-fourths* of this amount, or six thousand dollars, was the reasonable value of the use of the property for the period during which she was deprived of its use by reason of the injunction.

The following is the substance of all the testimony as to renting houses by the season:

Ralph Jenkins testified: That houses of that kind seldom occupied before first of December and generally occupied till June; think season of the year is about six months; always custom in the city for houses of that size to be vacant during summer; have no houses in that immediate neighborhood for rent (p. 36).

Know the broker who rented the Morgan house opposite; know practically that the rent was $13,000; this rent is practically for the season, *the season being a year as far as large houses are concerned;* rent payable monthly; whether the tenant has right to occupy it for the year depends upon the conditions of the lease (p. 36).

People usually enter into leases of that character not later than the first of October, but the occupancy usually begins about the first of December (p. 37).

Horace H. Westcott testified: Know the Munn house and have been in it: *the year and the season are practically the same;* the rentals come about the same; there is very little difference; Munn's house should rent for between eight and ten thousand dollars for the season or the year, which does not make any difference; the season would be from October or November till following June, or it might run from December to June; they are generally rented in September or October (p. 38).

During September, or even earlier, people come to town to look for houses, and they take them for the season or year; it would not be a probability to rent such a house as this one for three or four months beginning with February or March; a slim chance, except perhaps during inauguration; such houses may be taken in summer to commence in September or October or November, very seldom later than November (p. 40).

As a rule it is earlier than November; they might not move in, but the lease would start two or three months before actually taking possession, but the season is considered as running from October, November or December through to the following June (p. 40).

Edwin C. Brainerd, for defendant, states (p. 53) the Munn house should bring $6,000 per annum, when a house is rented for a season do not receive the same amount as if rented for the year; rented the Carpenter house, next to Mackey-Smith's, for six months (p. 53).

John T. Meany testified that he has been in real estate business 20 years (p. 65); think Munn house worth between five and six thousand dollars a year.

Passing by the objections already urged as tending to show that Mrs. Munn was not deprived of the use of the house, for the period claimed and allowed, by reason of the injunction, yet admitting that she was and that it was because of the injunction that the house was not completed until early in May, yet we deny that in consequence she was entitled to an allowance for rental for three-fourths of a year, or the equivalent of nine months, at the rate of eight thousand dollars per year.

Some testimony was adduced as tending to show that such a house as this one was usually rented for the season, but that the rent received was the same as for a year, and that this gave the tenant the right to the use for a year.

though it was occupied as a rule only for the fall until late spring. The testimony also shows that such an agreement is usually made in September, though possession is frequently not taken until later. Because the auditor believed this house belonged to that class, he allowed for the seasons rental, and, in doing this, we claim he erred.

The appellant contends that the auditor, as well as the Court of Appeals, erred in the application of the law to the facts in the case.

The erection of the building was begun in August, 1902. This suit was filed on August 14th of that year, and the restraining order was issued the same day. The injunction was dissolved on November 21, 1902. The building was finally completed the latter part of April.

The auditor found as a fact that the rental value of the principal house not directly affected by the injunction, was $8,000, and he found that three-fourths of this amount, or $6,000, was the reasonable value of the use of the property for the period during which Mrs. Munn was deprived of its use by reason of the injunction. He allowed this amount because of the principle of law, adopted by him, and which the appellant contends is incorrect, that Mrs. Munn was entitled to a season's rental for the property. That is to say, he allowed for the rental value of the property, not merely for the period that the building would have been, and actually was, in course of erection when the injunction was not in force; not merely for the period during which the injunction was in force, but for a season's rental, or a period of nine months. He allowed for rental *after the house was fully completed*, and when the owner could have occupied it if she had wished to. The period of nine months for which the allowance was made began from the date the injunction issued, expiring on May 14th. The house was finished in the latter part of

April, though the exact date does not appear. The auditor found as a fact, and this was concurred in by the Court of Appeals, that the architect and builder, the agents of the owner, failed to exercise due dilligence in the prosecution of the work; that by the exercise of reasonable diligence the building could have beeen completed 30 days sooner than it was. Accepting this finding, the building which was actually completed in the latter part of April, should have been completed in the latter part of March. The allowance made by the auditor and sustained by the court below included rental for this period of 30 days during which the agents of the owner failed to exercise reasonable diligence in the prosecution of the work. The allowance for this period of time, the allowance for the time after the actual completion of the building, the allowance of rental for the time that would have been required to complete the building had no injunction been issued, is well calculated to shock one's sense of justice and violates well known principles of law.

Intimately involved in the objection now being considered is the objection that under the peculiar circumstances of this case the rental value is not the measure of damages as hereinafter considered. But whether that be so or not, the allowance of damages for a season's rental essentially involves a finding as the basis of the relief granted, that, *except for the injunction,* the owner would have and could have rented the house, and that she has thereby lost the season's rental. It being conceded that the house never was rented; that the owner would not have rented it if she could; that no effort to rent it was made and no offer to rent it received; it certainly follows that Mrs. Munn cannot recover damages for being deprived of the use of her real estate for a period longer than the injunction was actually in force.

In Alexander v. Colcord, 85 Ill., 323, suit was brought to recover damages for issuing out an injunction. The court said:

> "The injunction deprived appellee from exercising acts of ownership over the land during the time it was in force, and he is entitled to be reimbursed for such damages as are the necessary and proximate result of that deprivation. In determining the extent of such damages the court proceeds upon equitable principles and is not governed by arbitrary or technical rules. Hence, the question naturally arises here, *what has appellee lost that he would have had but for the service of the injunction?*"
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> Therefore, if appellee was not intending to use the land for pasture or was not properly prepared to do so, he has lost nothing that he would have had but for the injunction. In other words, the injunction has, *in this respect*, deprived him of nothing that, had it not been served, he would have enjoyed."

As stated, *this house was never rented, and never was for rent.* The Munns never pretended they desired to rent it. In the next place, according to their own claim, the actual work of construction of this addition was not to have been completed until the middle of November and the completion of the ball room not until after that date. And the ball room not enjoined, was *not in fact completed* till after the return of the Munns in the *April or May following.* In the next place, it is an obvious fact, in the District, *that a new house is not fit for occupation immediately after completion.* In the next place, it is an obvious fact that people who rent houses of that character would not rent and move in a new house immediately after com-

pletion. Furthermore, the interior decorations and furnishing of the new addition had to be made. All of which means that it must have been some time after the middle of November before this house could possibly have been occupied. Independent, therefore, of the injunction, and assuming the house was one for rent, it *could* NOT HAVE BEEN LEASED FOR THE SEASON. Such contracts are made, as the appellee's witnesses state, usually in September. They give the right to possession from that time and run for a year. The possession of this house could not have been given until the middle of November, and then it would have been of a perfectly green building, with an unfinished ball room. And if they had leased it, it would have given the tenant the right to the possession until the succeeding fall. In this case, the Munns had the right to possession after early May. These facts demonstrate with certainty that the Munn house is not and never was one of the class to which the witnesses refer, and even if it had been, it could not have been rented for the season of 1902-03. And what is an important fact, not shown in this case, there was no one who desired to rent it. *If a person seeks to recover the rental value of property, he must show that he could have rented it, and there is not a line in this case to support that claim.*

After proceeding one and one-half months the work had progressed to the extent that the foundation walls of the addition 12x32 feet were level with the ground or thereabouts. It took from November 21st, when the injunction was dissolved, to the 30th day of December to complete the brick work. This was an additional period of one and one-half months, which, added to the period consumed prior to the injunction, makes approximately three months. The auditor found that the period from December 30th to February 14th was consumed in preparation for plastering,

while the evidence shows the property was idle during that period so far as the addition was concerned. What was done during this period of one and one-half months does not appear, and what was necessary to be done must rest with the imagination, but a liberal imagination cannot conceive what work was required by carpenters on the interior to prepare the building for plastering which would have occupied one and one-half months. Nevertheless, taking the finding of the auditor as correct, there was then a period of exactly one and one-half months more occupied upon this 12x32 feet addition preparatory to lathing and plastering, this added to the previous period of three months, makes a total of four and one-half months, on the theory that the work *progressed diligently*. After these one and one-half months were consumed in lathing and plastering which, added to the four and one-half months makes six months; but the auditor found that the period consumed in lathing and plastering was unreasonable and that it should have been completed in fifteen days instead of one and a half months. Taking fifteen days as a reasonable time therefor, and adding it to the period of four and one-half months previously consumed, we have five months necessary to do the work, with reasonable diligence to the point where lathing and plastering had been completed. The period from March 21st, when the plastering was completed, to the first week in May, when the work was finally completed, the auditor found to be reasonably necessary. This makes one month and one week to be added to the period already stated, making a total of exactly six months and one week actually and necessarily occupied in doing the work upon this addition. As against this testimony of the actual time necessary to do the work, the auditor adopted, as the basis of his entire report and finding, the estimate of the builder that the work could have been com-

pleted within four months from the time he began work. (R., p. 78). But this estimate, which was nothing more than a belief, cannot possibly stand against the fact as to the time actually consumed. The finding of the auditor, based upon the testimony of the defendant's witnesses, was that six months and one week were actually consumed and were actually necessary in the due and diligent prosecution of the work. It therefore follows absolutely, that the builder's belief was erroneous and that, irrespective of the injunction, this work would have consumed, as it did in fact, six months and one week for completion. Adopting this actual finding as the work was begun about the first of July, we find that the work could not have beeen completed until about the first week in January, and if this is so, and it is so, as the court must necessarily find, the dwelling of the defendant could not possibly have been ready for the season. The allowance therefore of a season's rental for the house was clearly erroneous.

## POSSIBILITY OF RENTING CONJECTURAL—NO DAMAGE RECOVERABLE.

The law does not permit a party to recover damages because she has been deprived of her real estate, so that she could not appropriate it to an imagined purpose, which might have been attended with profit, when it is conceded that she did not design so to use it. Such an allowance violates the principle that the damages are restricted to loss actually sustained.

In the case of Worcester vs. Great Falls Mfg. Company, 41 Me., 159, the plaintiff was the owner of certain land bordering on a river having a mill site and waterfall thereon in the same river. The defendants erected a dam across the river below the land containing the mill site and waterfall of the plaintiffs, and thereby overflowed

the same. In passing upon the rule of damages for the injury to the mill site, the court, through Chief Justice Tenney, said:

> "No rule has ever been recognized as having existence in law that a party can recover damages for being deprived of the use of his real estate, *so that he cannot appropriate it for a certain imagined purpose,* which might be attended with profit to him, *when it is proved, that he did not design so to use it;* he may have damages for the injury actually sustained, by being deprived of his land, but no further.
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> Damages, as we have seen, are given as a compensation for something the owner has lost, previous to the commencement of his action, and not for that which he might have lost, if he had devoted the property to a purpose which he never contemplated. The doctrine contended for by the plaintiff's counsel would often make it advantageous to an owner of real estate, capable of being beneficially improved, that he should be obstructed in his occupation of the same by a wrongdoer, when he had no design whatever of so improving it.
>
> The sum of $93.67 found by the jury, was for an injury purely hypothetical, having no basis in fact. *No evidence was introduced for the purpose of showing that the plaintiffs wished to make sale of the mill site and waterfall,* or that they could have done so, to be occupied by mills and other erections, and there is no foundation for damages on this account." (p. 164).

In Burruss v. Hines, 94 Va., 414, an action brought to recover damages for loss sustained by reason of the failure of the defendant to remove a wall in order that the plaintiff might complete the erection of a store and office

building. It appeared that the plaintiff had in fact rented the building at a fixed rental, possession to be given on a certain date upon the completion of the building. The question arose as to the measure of damages. The court said:

> "The general rule in awarding damages is to give compensation for pecuniary loss; that is, to put the plaintiff in the same position, so far as money can do it, as he would have been if the contract had been performed or the tort not committed (Sedgwick on Damages, 8th ed., sec. 30); or, as was suggested by Judge Joynes, in Peshine v. Shepperson, 17 Gratt, 485, it would be more appropriate to say that "the object of the law is to give amends or reparation."
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> "The plaintiff is entitled to recover all such damages as are the natural and proximate results of the wrongful act complained of. 2 Greenleaf on Evidence, sec. 256; Sedgwick on Damages, sec. 122; and Peshine v. Shepperson, supra. The rule is well established and uniformly enunciated by the courts, but there is often difficulty in applying it to a particular case. The plaintiff must show not only that he has sustained damage, but also show with reasonable certainty the extent of it. And it must appear that such damage was the natural and proximate result of the injury.
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> In the case at bar, it was shown that the plaintiff had contracted for the erection on his lot of the building referred to and had begun its erection, when it was ascertained that the work could not be further prosecuted on account of the obstruction by the defendant's wall. The defendant was notified by the plaintiff of his purpose to erect the building; of its plan and character; of the obstruction to its erection caused by the

condition of the adjoining wall of the defendant's warehouse; and required to remedy the defect in his wall or remove it. He was fully advised as to these material facts.

* * * * This sum was not speculative profits, but was based on *actual lease* of the property at a *fixed rent.* Its loss was specially claimed in the declaration as an item of damage; was proved with the requisite certainty; and was the natural and proximate result of the conduct of the defendant and the injury complained of.

* * * * The case before us is clearly distinguishable from that of Bingham v. Walla Walla, 13 Pacific R. 408, upon which counsel for the plaintiff in error much relied. In this case there was an actual renting of the property for specific sums of money, while in that case there was no evidence upon which to base the rental value of the building which the owner of the lot was prevented from erecting. So far as can be gathered from the report of that case, the contemplated building was never erected; no contracts to lease it, when completed, were ever made; and it was wholly conjectural whether there would be any rent or not."

The distinction between the foregoing case and the case of Bingham v. Walla Walla, 13 Pacif. Rep. 408, emphasises our contention that where there was no leasing, and no purpose to lease, damages because of inability to lease, cannot be allowed.

In Wagner v. Corkhill, 40 Barb., 175, in an action to recover damages for failure to complete a building being erected for the owner's own use, an attempt was made to

recover the rental value of the building for the delayed period. The court said:

"Assuming that these findings of fact are warranted by the evidence, and also that the value of the use of the building, if it had been, or might have been, rented, was $191.50 for those three months and four days still, I am of the opinion, as the case stands upon the evidence, that sufficient facts are not found by the referee to justify the conclusion of law that the defendant is entitled to recoup that sum, or indeed any other, against the plaintiff's claim. It is not found either that the defendant wished or expected to use the building himself, or *that he might, or could, have rented it to any one,* between the 11th of January and the 15th of April, had it been finished at the former period. It is plain enough, from the whole evidence, that the defendant did not contemplate using the building himself, or in his own business, but that he caused it to be built for the purpose of renting it to others. This being the case, it is quite obvious that if the defendant could have rented the building on the 11th of January, or at any time between that and the 15th of April, when it was completed, and was unable to rent it for the reason that it was unfinished, he has lot just what he might have obtained for its use during the time it might and would have been used, had the plaintiff's contract been performed. On the contrary, if the defendant *had no opportunity to rent* it until after the 15th of April, and *could not have rented it* had it been finished before, then it is plain that the allowance of the $191.50 by way of recoupment is for a mere speculation, and not a real loss.

* * * * Damages are awarded in law as a compensation for an actual loss, occasioned by some fault

of the party against whom they are awarded. But before they can be allowed, the party claiming must show in some way that they have been thus occasioned, either by direct proof of the fact, or by proving a state of facts from which the law will raise the presumption.

In Flinnegan v. Allen, 60 Ill. App., 357, the court said:

"As a general rule the expected profits of a business cannot be proved, and therefore cannot be recovered. * * * Instead of profits there might have been losses. * * * There may be found cases in which courts have allowed proof of the profits which might have been made under contracts of which the wrongdoer who prevented their performance had notice."

In Sturges v. Hart, 45 Ill., 107, an action to recover damages for loss of sale of property occasioned by an injunction, the court said:

"Neither is there any evidence upon which damages can fairly be assessed under the third breach. To sustain this portion of the verdict, it should appear that the plaintiff had probably been prevented from making a sale, and this should be shown by proving that a bona fide application to buy had been made by some person, and that the *failure to sell was fairly attributable to the injunction.*"

In Green v. Williams, 45 Ill., 209, a suit to recover damages for keeping the plaintiff out of possession of his property, the court said:

"The plaintiff is also entitled to recover all expenses necessarily incurred by her in consequence of the defendant's refusal to give possession, so far as

such expenses are declared for, but she is not entitled to recover profits that she might have made by conducting her business on the demised premises. Such damages are remote, speculative and incapable of ascertainment. Besides, it does not appear that the plaintiff was not able to find another store equally favorable to her business."

In Bingham v. Walla Walla, 13 Pacif. 415, the court said:

"The damage claimed by him is for prospective profits which he might have received from the rent of the building had he been permitted to erect the same. We think this element of damage too remote. 1 Sedg. Dam., 266-268 and notes."

The case of Lange v. Wagner, 52 Md., 310, was an action on an injunction bond for damages. The injunction restrained the erection of a brick stable. This instruction was granted:

"That in estimating damages for plaintiff, if any, the jury cannot make any estimate of the rental value of the brick stable mentioned in this case, because said stable does not appear to have been in the course of erection for the purpose of rental, and because that there is no proof in this case that the plaintiff ever offered the same for rent or ever was offered rent for the same."

The foregoing instruction was approved by the Court of Appeals.

In Galveston v. Miller, 38 S. W., 1133 (Tex.), in an action on an injunction bond, the court said:

"The damages which a party wrongfully enjoined is entitled to recover are measured by the principle of giving just and adequate compensation for actual loss which is the natural and proximate result of the injunction. Where there is no malice or fraud in suing out the writ, the damages are ascertainable by analogy to the rule governing damages in a case of ordinary breach of contract or duty, and in such a case the damages to be allowed are the proximate and natural damages arising from such a breach, unless the opposite party has notice of some particular contract which would be affected by the breach."

High on Injunctions, Sec. 1663.

"In estimating damages sustained by the improper issuing of an injunction, the courts proceed upon equitable grounds, and while it is difficult to fix any precise rule or standard for determining the damages upon dissolution, it may be said generally that nothing will be allowed which is not the actual, natural and proximate result of the wrong committed. * * * Speculative and remote damages are not properly allowable, nor are those which are merely consequential, the limit being such damages as flow directly from the injunction as its immediate consequence."

From the foregoing authorities it seems clear that the allowance of rental value for the period the building would have been in the course of erection irrespective of the injunction, for a period after the injunction was dissolved, and for a period after the building was fully completed, is erroneous; that the loss for which compensation was awarded was not an actual loss, and was in no sense the "actual, natural and proximate result" of the restraining order.

## THE AUDITOR ERRED IN ADOPTING AS THE MEASURE OF DAMAGES THE RENTAL VALUE OF THE MUNN DWELLING.

Now, it will be borne in mind, that the injunction did not relate to the main dwelling, nor did it interfere with its use, nor did it prevent the defendants from doing anything that would make it habitable pending this litigation. The injunction merely *restrained the completion of the new addition* so far as the west wall affected the light and air of the complainant. The interference with the enjoyment of the main building was not the direct and immediate effect of the suspension of work on the addition. Now, while insisting that the measure of damages cannot and ought not to include any allowance for the rental value of the main building, yet waiving what we consider to be the true rule, we deny that the measure of damages is rental value. Assume for a moment an extreme case, and about which no question could arise, the case of an injunction that expressly restrained or enjoined the use of the main Munn house. Under ordinary circumstances, in such a case, the measure of damages would be the rental value of the dwelling. But we submit *that that is the measure of damages only where the house is one that is intended for rent and that rental value is in fact thereby lost.* In this case, the house never was for rent. How, then, can we possibly say Mrs. Munn lost the rental value thereof during the time its use was prevented? We submit, therefore, that where the house is intended for occupancy, and this occupation is prevented, the measure of damages is what the owner is required to pay for another house equally as good, but in the same city. And this is obviously so. Assume the Munns had returned to Washington, as they had the right to do, and assume as a fact

that they could not get into their own house because of the injunction, and assume further that notwithstanding every reasonable effort, they were unable to find a house that would be suitable for a rental of less than $12,000 for the year. Under such circumstances, would they be limited to the much smaller rental value of their own house, or could they recover the amount they were required to pay for one equally as good or the best they could obtain, and why could they do so? Because, in such a case, the measure of damages is what they were required to pay to get a house equally as good or the best they could. But the person must actually come to the city and endeavor to get a house, and must actually get it and actually pay out money on account thereof. But that was not done in this case. The Munns did no even come to this country. They made no effort to secure another house. There is no suggestion that they could not have gotten another house. They preferred to remain abroad. Under such circumstance, is the measure of damages, to suit their convenience, to shift back to rental value, and are they to be allowed rental value for something they never intended to rent, and which in consequence they never lost. We submit not.

Sutherland on Damages, last ed., section 868, quoting from a case there mentioned, says:

> "On the other hand, if a house (the use of which is enjoined) *be hired for a dwelling,* THE COST OF ANOTHER *having equal advantages, is the only guide in determining the damages.*"

And, of course, it follows, if no expense was incurred in procuring another, and no effort was made to secure one, there can be no recovery.

A remarkable thing in this case is that there is no evi-

dence whatever tending to show any loss resulting from the failure to complete the three-story *addition* in time, which is the only thing that was enjoined. The construction of the *addition* is enjoined; the damages allowed are for the rental value of the *adjoining house*. Remarkable, is it not? If rental value is to be the basis, then the basis in this case was the *rental value of the new addition* for the period of time its completion was actually delayed by the injunction. The main building was in no way enjoined, either in use or restoration, and if the work on the addition had so far progressed as to interfere with the use of the main building, when the injunction issued, it was incumbent on the owner to restore the main building so as to make it habitable, and it could have been done in this case at a small expense. It is true that the Munns may have preferred not to live in this house while a building was being erected alongside, but that has no bearing upon the question of damages. If they could have done so, that is all that need be shown, and that has been done.

The leading case in England, as to the measure of damages on an injunction undertaking, is the case of Smith vs. Day, 21 Ch., Div. 421, repeatedly cited in other cases. That case is almost a perfect parallel to this case, except there the house was intended for rent; in this case, for use as a dwelling. In that case an injunction was issued to restrain the defendant from building so as to prevent the access of light and air to the plaintiff's windows; the injunction was granted *ex parte*, upon giving the usual injunction undertaking, and was thereafter dissolved. On an inquiry as to damages it was claimed that the defendant had agreed to let part of the property with the new buildings to a tenant and was prevented from carrying this out by the injunction preventing the completion of the new addition. The court held that "even if there had been a

binding agreement by the proposed tenant to take a lease and the injunction had so interfered with the building as to entitle the tenant to put off the bargain, damages ought not to be granted in respect of it, for that damages must be confined to the immediate, natural consequences of the injunction under the circumstances which were within the knowledge of the party obtaining the injunction.

Brett, L. J., said:

> "If any one obtains an injunction preventing another from proceeding with a building, he must be taken to have notice of everything in the building contract, and all liabilities which the person stopped incurs to his contractor by reason of the stoppage, are a natural and immediate consequence of the injunction. But the fact that the injunction prevents the carrying out of an entirely independent agreement as to the property is too remote."

Another judge said, in the same case:

> "The only damages suggested are that the defendant lost the advantage of a beneficial lease which he had agreed to grant. * * * I think that the damages must be confined to loss which is the natural consequence of the injunction, under the circumstances of which the party obtaining the injunction has notice, as for instance, a claim by the builder in consequence of the injunction compelling the defendant to break his contract with him."

The injunction undertaking stands upon a different footing from a mere contract and the liability thereon is not measured by the same rule. The distinction suggested by the preceding case, wherein the liability is strictly limited

to the immediate results of the writ, and excluding consequential damages, is further emphasized by High in his work on Injunctions, Sec. 1663, wherein he says:

> "In estimating damages sustained by the improper issuing of an injunction, the courts proceed upon equitable ground, and while it is difficult to fix any precise rule or standard for determining the damages upon dissolution, it may be said generally that nothing will be allowed which is not the actual, natural and proximate result of the wrong committed."
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> "Speculative and remote damages are not properly allowable, nor are those which are *merely consequential,* the limit being such damages as flow *directly* from the injunction as its *immediate* consequence."

When we consider that the injunction in this case merely enjoined the extension of the west wall of the new addition, and did not enjoin the use of the adjoining building, and when we consider that all of such adjoining house except substantially the rear parlor, and possibly another room or two, was habitable, and that the whole of it could have been made so in a few days at a small cost, we respectfully submit damages for the rental value of an *adjacent* building, not of the building enjoined, cannot be allowed, particularly when such adjacent building was never for rent, and there is no showing that it could have been rented, if it had been. The alleged damages resulting from loss of rental, if attributable at all to the injunction, are not "its immediate consequences," but are "merely consequential" and cannot therefore be allowed.

While the case of The Conqueror, 166 U. S., 110, is an admiralty case, the opinion of the court, and particularly

that part referring to damages and the proper measure thereof for the detention of the yacht, is full of suggestions bearing upon this case, and particularly that portion of the opinion, found on page 133, enforces the argument advanced in this case that rental value is not the measure of damages, in as much as the house was not held for hire nor would have been leased if the owner had been able to do so, even at the high price allowed by the auditor, and the further contention that an allowance cannot be made for the detention because there was no evidence of actual loss. As said by the court in that case—it does not belong to the class that is to be rented or let. In its opinion the court said:

> "Without imputing to the witnesses, who were sworn in this case upon the subject of damages, any design to mislead the court, we are bound to say that their testimony falls far short of establishing such a case of loss of profits as entitles the libellant to recover this large sum for the detention of his yacht. *It is not the mere fact that a vessel is detained* that entitles the owner to demurrage. *There must be a pecuniary loss,* or at least, a reasonable certainty of pecuniary loss, and *not a mere inconvenience* arising from an inability to use the vessel for the purposes of pleasure, or, as was said by Doctor Lushington, in the Clarence, 3 W. Rob. 286: "There must be actual loss and reasonable proof of the amount." In other words, there must be a loss of profits in its commercial sense. In all the cases in which we have allowed demurrage the vessel has been engaged or was capable of being engaged, in a profitable commerce, and the amount allowed was determined either by the charter value of such vessel or by her actual earnings at about the time of the collision. *The Conqueror,* however, *did*

*not belong to the class of vessels which are engaged in commercial pursuits, or are ordinarily let to hire.* There is doubtless a class of pleasure boats that are let for excursions, and become a source of pecuniary profit to their owners; but The Conqueror did not belong to that class. She was purchased by her owner for his personal pleasure, *and there is not an atom of testimony tending to show that he bought her for hire, or would have leased her if he had been able to do so,* even for the large sum of $100 per day fixed as her value."

Supplementing what has been said already on this subject, and assuming, for the purposes of argument, that the court shall consider there is a liability on the undertaking to Mrs. Munn, notwithstanding the fact that she was never enjoined or deprived thereby of any vested legal right, as held in the Maryland case, then we submit the measure of damages, as held in the cases cited, would be what she was required to pay for another house, of similar kind, in the same city, and as no such loss or expense was incurred, there is no liability on the undertaking.

Proceeding a step further, if the court shall be of opinion that this measure of damages is not the correct one, as we insist is the case, then as this house was not intended for rent, but for the owner's use only, the liability, according to the authorities, is limited to the rental value for the time the injunction was in force; and in any event that it is a mistake to allow for the annual or seasonal rental value of a house never intended to be rented.

As between owner and contractor, the measure of liability, undoubtedly, is limited to the rental value of the house during which the owner was deprived of it by reason of failure to complete on time. The law does not take

into consideration, in allowing damages, that the owner might not want to return to the United States and occupy her house. If she does not, then she incurs no loss whatever, and that is really this case.

As between contractor and owner, where the house is intended for renting purposes, the owner is entitled to the rental value between the date it should have been completed and the date of final completion, if the property could have been rented during that time, and this fact must be shown.

McIntire v. Barnes, 4 Colo., 285, 289.
Korf v. Lull, 70 Ill., 420, 424.

But where the circumstances justify the allowance of rental value, the damages are limited to the rental value during the time the injunction was in force.

In Hosmer v. Campbell, 98 Ill., 572, an action for damages on an injunction bond, the court said:

> "The damages sustained would be equivalent to the rental value of the property *during the period the injunction was in force.*"

Assuming that there is any liability whatever on the undertaking in this case, which we deny, then we submit, in view of the foregoing authorities, that the measure of damages should be limited to the period the injunction was actually in force, namely, three months and one week, and taking the finding of the auditor as to the rental value of the house per year as correct, namely, $8,000.00, the allowance in any event could not have been more than $2,166.66.

## THE INJUNCTION UNDERTAKING SHOULD NOT BE ENFORCED IN THIS CASE.

The power to impose a bond as a condition for the injunction carried with it the power to relieve or mitigate the liability thereunder, in the exercise of a sound discretion by the court.

Russell vs. Farley, 105 U. S. 442.
Leslie vs. Brown, 32 C. C. A. 556.
Tyler Min. Co. vs. Last Chance Min. Co., 32 C. C. A. 498.

In Russell vs. Farley, the Supreme Court said:

"Since the discretion of imposing terms upon a party, as a condition of granting or withholding an injunction, is an inherent power of the court, exercised for the purpose of effecting justice between the parties, it would seem to follow that, in the absence of an imperative statute to the contrary, the court should have the power to mitigate the terms imposed, or to relieve from them altogether, whenever in the course of the proceedings it appears that it would be inequitable or oppressive to continue them.

* * * * * *

"In the course of the cause, or at the final hearing, it may manifestly appear that such an extraordinary security ought not to be retained as a basis of further litigation between the parties; that the suit has been fairly and honestly pursued or defended by the party who was required to enter into the undertaking, and that it would be inequitable to subject him to any other liability than that which the law imposes in ordinary cases. In such a case it would be a perversion, rather than a furtherance, of justice to deny to the court the power to supersede the stipulation imposed."

We submit it would be inequitable, under the circumstances of this case, to enforce any liability on the injunction undertaking. We have a case in which the principal defendant, who claims the damages was abroad, not within the jurisdiction of the court, not served with process, not served with the injunction and not entering her appearance or filing her answer until October 30th, *two months and a half* after the injunction was granted, though she had notice of it in August; we have a case in which the record does not show that she suffered the slightest inconvenience or was subjected to the slightest loss by reason of the injunction; we have a case in which her representatives engaged in the construction of the building manifested no diligence whatever in the prosecution of the work; a case in which the work enjoined was not the only work in progress, and, therefore, not the sole cause of the condition of the principal building; a case in which the extension of the west wall of the new building was enjoined, and an allowance for the rental value of an adjacent building, the use of which was not enjoined; a case in which the entire *new building cost* $6,900, *with liberal fees to architect and builder, and the allowance made for alleged damages of* $6,000. We, therefore, submit that this case is one in which there should be no allowance for damages, and particularly for damages for alleged loss of rental value, no other damages being shown.

We accordingly submit in conclusion that there is no liability whatever in this case on the injunction undertaking because Mrs. Munn was never enjoined, because the work enjoined did not occasion the damage, because other work, not enjoined, was in progress at the time during which the injunction was in force which rendered the house uninhabitable, and because the defendant failed to show that the damages sustained were due exclusively, if at all, to the

effect of the injunction; but on the other hand, if the court shall not adopt any of these views, though we submit they are all well founded, then it is contended that the delay in the completion of the work was due to the lack of diligence on the part of the defendant, that her own negligence contributed to the damages sustained, and that the damages should be limited to the period the injunction was actually in force and during this period should be restricted to the loss actually occasioned thereby.

Respectfully submitted,

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No. 163.

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STILSON HUTCHINS, WILLIAM J. DANTE, AND BEN. B. BRADFORD, APPELLANTS,

*vs.*

CARRIE L. MUNN.

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**ARGUMENT AND BRIEF IN BEHALF OF APPELLEE.**

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

## No. 163.

STILSON HUTCHINS, WILLIAM J. DANTE, AND BEN. B. BRADFORD, APPELLANTS,

*vs.*

CARRIE L. MUNN.

## ARGUMENT AND BRIEF IN BEHALF OF APPELLEE.

### Statement of the Case.

In the year 1888 the appellee, Mrs. Munn, bought from the late Secretary Windom lot 141, square 181, situate on the corner of Massachusetts avenue and 16th street, in Washington, also fronting on Scott circle. The lot was improved by a handsome private residence, extending the entire depth of the lot on 16th street, with an unimproved portion on the west of the dwelling, having a front of twelve feet on Massachusetts avenue.

In the summer of 1902 she determined to build an addition to her house covering this vacant piece of ground. An architect of large experience was employed to prepare plans, a permit for the proposed structure was procured from the inspector of buildings, and a prominent builder was engaged to purchase the material and superintend the work of construction.

This done, Mrs. Munn closed the house, and in May, 1902, went to Europe with some of her children, Mr. Munn following in July with the other children.

Work was begun about the middle of July, under the direction of Mr. James G. Hill, the architect, by Mr. William P. Lipscomb, the contractor. The foundations were dug, the foundation walls laid, and a portion of the west wall of the main building and a bay window in the west wall were removed to make way for the new building. On the 14th of August, and just when the foundation walls were even with the surface of the ground, Stilson Hutchins, one of the appellants and the owner of the ground next adjoining on the west, exhibited his original bill on the equity side of the Supreme Court of the District of Columbia, against Mr. and Mrs. Munn, the architect, and the contractor, and procured thereon a temporary restraining order enjoining "the defendants and each of them * * * from the erection of the addition to the dwelling" (R., p. 7).

An approved undertaking was filed, as required by the rules of court, conditioned to make good to the defendants all damages by them "suffered or sustained by reason of wrongfully and inequitably suing out the injunction" (R., p. 7).

Defendants Hill and Lipscomb were served with process. Mr. and Mrs. Munn were still in Europe and against them no summons was issued; but an appearance was entered in behalf of all of the defendants, answers were filed by Mr. Hill and Mr. Lipscomb, and a motion was made on the 17th day of August to discharge the restraining order. After hearing counsel for parts of two days, the justice presiding informed counsel for defendants that he would not dispose of the case until Mr. or Mrs. Munn, one or both, had answered the bill (R., p. 41).

For the purpose of conferring with counsel in reference to the answer, and for no other, Mr. Munn, then an ill man taking the cure at Carlsbad, crossed the ocean and returned to Washington. In behalf of himself and Mrs. Munn, he

answered the bill on the 30th of October, 1902, and the same day a further motion was made for the discharge of the restraining order. Some days later this motion came on for hearing before Mr. Justice Hagner, and on the 21st of November he passed an order dissolving the restraining order. From this order of dissolution Mr. Hutchins noted and prosecuted an appeal to the Court of Appeals, and the order was affirmed on the 23d of May, 1903 (22 Apps. D. C., 88).

Meanwhile, and within a week after the restraining order was discharged, work was resumed and the new building was finished some time in May, 1903.

On the 28th of May, 1903, an order was passed in the court below referring the cause to the auditor "to ascertain and report the damages, if any, suffered or sustained by the defendants, or any of them, by reason of the wrongfully and inequitably suing out the injunction order" (R., p. 17).

Owing to the illness and subsequent death of Mr. Munn, the taking of testimony before the auditor did not begin until April, 1904, and was not closed until January, 1905.

The loss claimed by Mrs. Munn was itemized as follows:

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| Loss of the use of the dwelling-house for the season of 1902 and 1903 | $10,000.00 |
| Damages to furniture | 1,500.00 |
| Additional compensation paid architect | 100.00 |
| Fees to counsel for procuring dissolution of injunction and arguing the case in the Court of Appeals | 750.00 |
| Mr. Munn's expenses from Carlsbad to Washington and return | 350.00 |
| Total | $12,700.00 |

On the 18th of February, 1905, the auditor filed his report, in which all of the items of Mrs. Munn's claim were disallowed except the one relating to the loss of the use of

the house. This was reduced nearly one-half, the award being but $6,000.

Exceptions were filed in behalf of Mr. Hutchins and Mrs. Munn. After these exceptions had been argued and under consideration for some months, the equity court, of its own motion, recommitted the cause to the auditor to find and report whether there was any lack of reasonable diligence in the prosecution of the work, and the damages sustained by Mrs. Munn on the basis of her being responsible therefor. The second report of the auditor was filed on the 15th of December, 1905, in which he in effect reported that although the work might have been finished thirty days sooner than it was, the loss to Mrs. Munn was just as great, for that by reason of the temporary restraining order she had lost the use of her house for the season.

So the allowance of $6,000 was not changed.

The report of the auditor was finally ratified on the 26th of February, 1906 (R., p. 82). From this decree the complainant prosecuted an appeal to the Court of Appeals of the District of Columbia, where the judgment of the court below was affirmed. From this judgment of affirmance the present appeal is prosecuted.

## ARGUMENT ON THE FACTS.

Mrs. Munn paid for the property in question $70,000 (R., p. 24), at the time of its purchase from Secretary Windom, and subsequently made improvements at various times at a total outlay of between thirty and forty thousand dollars (R., p. 43), thus making the total cost about $110,000. The house was adorned with handsome pictures and bric-a-brac and richly and luxuriously furnished throughout. As well from its character as its location, it is properly considered one of the handsomest private residences in the city. It ought not to be necessary to adduce evidence to show that the value of the use of such a house in Washington is $6,000 for the season, as allowed by the auditor. It is a matter of which the court may almost take judicial cognizance.

As has been stated, the work was begun on the 14th of July, and but for the restraining order would have been completed in November (R., p. 30). The restraining order was issued on the 14th of August, and could not be disposed of till the 21st of November. In the meantime Mr. and Mrs. Munn, who had engaged their ocean passage for home, gave up their places on the steamer and remained in Europe (R., p. 27). They would have had no place to live in had they returned to Washington that fall, for Mr. Hill says their house was uninhabitable all the winter. He testified: "I took out the north and west walls of the back parlor and removed the bay window which opened into the front parlor; this left the main house uninhabitable all the winter" (R., p. 43).

But Mr. and Mrs. Munn were not trying to make a case against Mr. Hutchins by means of delaying their building operations. On the contrary, without waiting for the decision of the Court of Appeals on the appeal taken by Mr. Hutchins, the work was begun immediately upon the discharge of the restraining order, and pushed forward as rapidly as inclement weather conditions would permit. It was finally completed and the house ready for occupancy about the 23d of May, 1903. Thus Mrs. Munn lost the use of her house for that season, as it was their custom to live in it from October or November till May or June. They never occupied it in the summer months. Wherefore it was claimed in her behalf that under the injunction bond she should recover the value of the use of the house for the entire year.

On this point Mr. Jenkins, who lives at 1732 Massachusetts avenue, testified that houses of the character of Mrs. Munn's are generally occupied from December till June, and that they are always vacant in the summer months. Tenants may have the right of occupancy all the year, but never avail themselves of it. The season and the year are practically the same (R., p. 36).

Mr. Westcott, who lives at 1310 16th street, two doors north of the Munn house, testified as follows:

"The year and the season are practically the same. The rentals come about the same. There is very little difference." "The season would be from maybe October or November until the following June, or it might run from December up to the following June, and there is little probability of renting such a house in February or March, except perhaps during inauguration years, and then only for a month" (R., pp. 39, 40).

Mr. Brainerd, testifying in behalf of appellant, said he did not get as much for the season as for the year, but on cross-examination admitted that his notion was predicated of his own experience in renting a house for a Mr. Carpenter, at the time in Berlin. He rented this house once upon a time for six months, the best he could do, and it was vacant the rest of the year, of course (R., p. 54).

It ought to need no argument to demonstrate that Mrs. Munn could not have rented her house for the remainder of the season after the addition was completed; nor could she have rented a house of similar advantage until her own was ready for occupancy without paying as much for it as it would have cost to hire it for the entire season; nor yet could she be expected to bring the family from Europe and go to the trouble and expense of engaging a retinue of servants, in order to live in her own house for a month or less. Everybody who can afford it, even the President, is away from Washington during the months of July, August, and September, and most people of leisure and means—people able to live in houses like Mrs. Munn's—go away late in May, and, after spending October in the Berkshire hills, return about the middle of November.

Wherefore to deprive the owner of such a house of its use from the last of November till the following May seems a deprivation of such use for that entire year.

Touching the rental value of the house four witnesses gave testimony: Mr. Jenkins, who knew the house well and also the character of the furnishings, gave it as his opinion that

it was worth from ten to twelve thousand dollars a year. Mr. Westcott, who also frequently visited the Munns, considers its rental value from eight to ten thousand dollars a year. Mr. Brainerd, testifying in behalf of Mr. Hutchins, gave it as his opinion that the Munn house was worth $6,000 a year; but he had never been through the house and did not know how it was furnished. He further stated that it would be worth three or four thousand dollars more a year if it contained a ball-room (R., p. 55), as it did before the addition was contemplated. One of the objects of the addition was to increase the size of the ball-room, and install also a music-room.

Mr. Bradford, also testifying in behalf of Mr. Hutchins, thought the house worth not more than $6,000 a year; but he is an architect and has not recently rented houses of that character. Besides, he is one of the sureties on the injunction bond, a circumstance that must give color to his opinion and tend greatly to lessen his estimate of damages.

So the three unbiased and intelligent witnesses as to rental value—Jenkins, Westcott, and Brainerd—practically agree that the value of the use of the Munn house is $10,000 a year, and that amount should have been awarded by the auditor as an item of damage.

But it was claimed below that rental damages should be reduced because Mr. Hill and Mr. Lipscomb, architect and contractor, did not rush the work as they might have done, had they been willing to lay bricks with the thermometer at fifteen degrees, or go to the expense of putting in steam heat, or using salamanders to help along the plastering.

There was, of course, no heating apparatus in the new building, and Mr. Hill testified (R., pp. 45, 46) that the matter of installing the heating apparatus was complicated with other of the building operations, and that it could not be installed until the entire building was completed; also that the heating apparatus in the addition could not have been connected with the heating apparatus in the old portion of the building until the addition was fully completed.

Mr. Lipscomb is a well-known and responsible contractor and builder in Washington, and he testified that he used all reasonable speed to complete the building after the work was recommenced in November; but he also says that the work was delayed by the extreme cold, as will be manifest on a glance at the weather report, offered in evidence before the auditor (R., pp. 70, 71, 72).

Mr. Hill, the architect in charge, said he would not allow outside brickwork to be done in freezing weather, and Mr. Smithmeyer, also an architect of high standing and large experience and appellants' principal witness, said he always avoided outside brickwork when the weather is freezing (R., p. 64).

Walsh did the plastering under a contract entered into in the spring of 1902, almost a year before his work was begun. He is a plasterer of twenty years' experience, with a business of from five to twenty thousand dollars a year, and began lathing in the house as soon as it was ready for him to go into. This was on the 14th day of February. Between that date and the 1st of March there was an extremely cold spell, the thermometer going as low as three degrees above zero (R., p. 72). He began plastering on the 4th of March, though plasterers as a rule do not like to begin plastering until St. Patrick's day.

In Walsh's opinion, the use of salamanders is very unsatisfactory, and Mr. Hill says their use is apt to discolor the walls. Appellants called as an expert before the auditor a man bearing the name of Hughes. He testified that he would not proceed if "the weather was below freezing point" (R., p. 60).

Thus it was conclusively shown that Mr. Hill and Mr. Lipscomb used all reasonable diligence and proper precautions to complete the work, and that it could not be done sooner, due regard being had to proper construction. It will be remembered in this connection that the Munns were in Europe during this period of construction, and were in no

way directly responsible for delays in the prosecution of the work. They had employed a distinguished architect and a competent contractor to take charge of and do the work of building and naturally trusted in them; nor can it be supposed that Mr. Hill or Mr. Lipscomb could or would have permitted or connived at unnecessary or unreasonable delays in the prosecution of the work. Not only their reputations, but their interests as well, required the speediest completion of the building that was consistent with proper construction.

The argument of appellants' counsel proceeded upon the apparent theory that a cheap structure was under way in an obscure locality, and not an addition to one of the handsomest private residences in Washington, occupying a commanding position on Scott circle.

But the argument predicated of delay in completion falls to the ground when it is remembered that from the order dissolving the injunction Mr. Hutchins took an appeal, and that, without waiting for the result of this appeal, Mrs. Munn's architect and contractor went ahead and completed the work a few days before the Court of Appeals affirmed the judgment appealed from. She might have been justified in delaying the recommencement of the work until the judgment on appeal was pronounced. That she did not do this conclusively proves that she was not trying to make a case against Mr. Hutchins, but was actuated solely by a desire to have her home put in a habitable condition.

Wherefore it is clear that she should have been awarded the full rental value of her house for the season of 1902-3.

## The Auditor's Findings.

In his first report the auditor finds that the fair rental value of Mrs. Munn's house is $8,000 a year, the minimum estimate of Mr. Westcott, less than the minimum of Mr. Jenkins, and less than the minimum of Mr. Brainerd, who, as has been pointed out, fixed the annual rental value at $6,000, and added that it would be worth three or four thou-



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sand dollars a year more if it contained a ball-room. As it did contain a ball-room, Mr. Brainerd's minimum estimate was $9,000 a year. In this connection the auditor makes the following finding:

"Taking the estimates of the several witnesses touching the rental value of Mrs. Munn's property, I find a fair mean to be the sum of eight thousand dollars per annum, of which I find three-fourths, being six thousand dollars, to be the reasonable value of the use of the property for the period during which she was deprived of its use, by reason of the injunction" (R., p. 22).

But for the injunction, the house would have been ready for occupancy in the early part of November, and the Munns had taken passage for home with the intention of spending the winter in Washington, as they had been in the habit of doing, from October or November till the May or June following. This constituted their "season" of occupancy, and to have rented a house "approaching her own in location, condition, and equipment during such time" would have cost her a full year's rental.

On the point of "season" the auditor says in his first report:

"That there is a Washington season which affects the rental term and occupancy of a certain class of property is a fact so generally recognized as to come nearly if not quite within the scope of judicial notice. The property in question is of that class" (R., p. 22).

Again he says:

"The work was then (the middle of August) suspended until the decree of this court on the 25th of November dissolving the restraining order, so that three months and ten days of useful time for this character of work had been wasted. The building of the addition was not completed and the house ready for occupancy until late in April or very early in May of 1903, near the time at which it was the custom of the family to leave Washington for their summering. They were therefore deprived of the use of the property for the entire season of customary occupancy" (R., p. 21).

Again, in his second report, in response to the order of the court directing him to report what delays in completion occurred through lack of reasonable diligence on the part of Mrs. Munn's agents and what damages she sustained on the basis of her responsibility therefor, the auditor says:

"The property in question is of a class described in my original report as the Washington season residences,—that is to say, those which are as a rule only occupied from about the month of November to the following month of May. In renting property of this kind the prevailing practice is to treat its rental value for that portion of the year as equal to the yearly rent, and whether it be leased for the six or seven months or for the entire year, the rental is substantially the same" (R., pp. 79, 80).

Again he says, at the conclusion of his second report:

"In respect of the second inquiry, as to what damages Mrs. Munn sustained on that basis, I have to report that on the theory adopted by me, and from the conditions of the value or use of the premises, I am unable to change the allowance" (R., p. 80).

The auditor therefore finds that the rental value for the property in question is the same for the "season" or "year." This value he ascertains to be $8,000.

Though he further finds that Mrs. Munn had been "deprived of the use of her property for the entire season of customary occupancy," he allows her as damages for such deprivation only the sum of $6,000.

On the question of "lack of reasonable diligence" on the part of Mrs. Munn or her agents in completing the work, the auditor finds as follows in his second report:

"I find there was a lack of reasonable diligence in the work of lathing and plastering, which might be roughly estimated at thirty days" (R., p. 80).

To arrive at this conclusion he finds that no delays occurred prior to the first of January, and that the "evidence

by witnesses for Hutchins on this point is that the brick-work could have been completed in six weeks. As matter of fact, it was so completed" (R., p. 79).

The work was recommenced after the dissolution of the injunction, on the 25th of November. Then, according to appellants' witnesses, the brick-work ought to have been completed by the 10th of January. The lathing was begun on the 14th of February. Here, manifestly, the auditor assumes that unreasonable delay occurred, "which might be roughly estimated at thirty days." But he forgets that on the completion of brick-work a house is not ready for the plasterer. The roof remains to be put on, the floors must be laid and "trim" finished. For such work, in a house like Mrs. Munn's, thirty days is not an unreasonable time.

After the lathing was begun, the coldest weather of the year occurred, the thermometer standing near zero for several days. To have undertaken the plastering in such weather would have been a foolhardy thing, which no architect of Mr. Hill's standing and experience would have tolerated. When the severe cold subsided, and on the 4th day of March, the plastering was begun, and completed on the 31st of March—27 days—not more than a reasonable time for work of that magnitude.

With regard to this finding the Court of Appeals in its opinion says:

"We think the finding of the auditor that there was a delay 'roughly estimated at about thirty days,' in the progress of the work was a very liberal finding in favor of the appellant, in view of the fact that it would have taken two months and a half to complete the work during the period when the work could have been advantageously prosecuted; that is, from the middle of August, when the work was stopped by the injunction, until the 1st of November. Considering all the testimony, and having in mind the character and quality of the work, and that it had to be prosecuted during the winter months, we are unable to say that there was any unnecessary delay."

Mr. Hill was engaged in superintending an addition to one of the handsomest private residences in the city, and he was naturally anxious that it should be in keeping with the rest of the house; so he did not rush it, as is the custom in rows of cheap houses for sale or rent, but took only proper precautions against cracked walls and plastering by suspending operations during extreme cold weather.

Wherefore it is respectfully submitted that if the auditor erred it was in deducting $2,000 from what he found to be the value of the use of the premises during the period of deprivation; in finding any lack of diligence in the matter of the completion of the work, and in refusing to allow the claim of appellee for the damages to her furniture, because she could not testify explicitly how much dust had accumulated on each picture and chair in the house.

## THE FUNCTIONS OF AN AUDITOR AND THE EFFECT OF HIS REPORT.

**The auditor, or master, performs the part of a jury in common-law cases, and his report will not be disturbed except upon some obvious error of law, or some serious mistake in construing the evidence.**

"The conclusions of the master, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part."

Tilghman *vs.* Proctor, 125 U. S., 136, 151.

"This cause was referred to a master to take testimony therein, 'and to report to this court his findings of fact and his conclusions of law thereon.' This he did, and the court, after a review of the evidence, concurred in his findings and conclusions. Clearly, then, they are to be taken as presumptively correct, and unless some obvious error has intervened in the application of the law, or some serious

or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand."

Crawford *vs.* Neal, 144 U. S., 585, 596.
Furrier *vs.* Ferris, 145 U. S., 132, 134.

"There is another objection, however, to our examination of the facts in this case. The order referring the case to the special master, though minute in its details, did not require him to send up the testimony; neither does he purport to do this in his report; and while a number of depositions taken before him are filed, there is nothing to indicate that these were all the testimony in the case. * * * In the absence of any certificate that the entire evidence taken by the master was sent up with his report, it is impossible to impeach his conclusion in this particular (Scotten *vs.* Sutter, 37 Michigan, 526; Nay *vs.* Byers, 13 Indiana, 412; Fellenzer *vs.* Van Valzat, 95 Indiana, 128). There is no presumption that all the testimony was sent up" (293).

"The court, too, ought not to be obliged to rehear the whole case upon the evidence, as the main object of a reference to a master is to lighten its labors in this particular" (290).

Railway Co. *vs.* Gordon, 151 U. S., 185.

"The auditor is not a mere examiner in chancery, to take testimony for the convenience of the court and to return it to the court for its consideration. The auditor is a judicial officer, charged with judicial functions, as has been repeatedly decided; and his findings of fact are analogous to the verdict of a jury in a suit at common law."

"In the order of reference there was no requirement that the testimony, which the auditor was directed to take, in order to enable him to reach a determination, should be returned to the court, or made part of his report; and it may well be questioned whether the fact that he returned the testimony with his report justifies its being considered as a part of his report."

Smith *vs.* Trust Co., 12 App. D. C., 192, 197.

See also—

Richardson *vs.* Van Auken, 5 App. D. C., 209.
Grafton *vs.* Paine, 7 App. D. C., 255.
Haller *vs.* Clark, 21 D. C., 128.
York *vs.* Tyler, 21 D. C., 265.

In this case there can be no question but that all of the evidence on the question of damages has received full and careful consideration.

After the taking of testimony the auditor elaborately reviewed the evidence and embodied his conclusions in the first report.

Again, when the case was heard before the court on exceptions to the auditor's report, it was fully considered.

Then when the matter was recommitted to the auditor, he saw no reason to change his allowance, and upon a further consideration by the court the finding was affirmed, and judgment in accordance therewith entered.

These facts clearly demonstrate that the judgment is founded upon a careful and deliberate consideration and weighing of all the evidence in the case, both at the hand of the auditor and the courts below.

**The appellee is entitled to damages, though the injunction order was not actually served upon her.**

The original bill in this case was filed and the injunction granted on the 14th day of August, 1902. At this time Mrs. Munn, together with her husband and family, was in Europe. The injunction ran against "the defendants and each of them." It was only served on two of them, Hill and Lipscomb, the architect and builder engaged in the work of constructing the building.

Mrs. Munn was advised of the existence of the injunction while in Carlsbad, in August, 1902, and, acting under advice of counsel, Mr. Munn returned from Europe for the purpose of procuring a dissolution thereof (R., p. 25).

On August 27, 1902, Messrs. Hill and Lipscomb filed their answer to the bill (R., p. 41), and on the same day a motion to discharge the rule to show cause and to dissolve the preliminary restraining order or injunction was filed in behalf of *all* the defendants (R., p. 7). This motion was heard, but the court declined to dispose of the matter, stating that he preferred to wait until the answer of the defendants Munn was filed (R., p. 41).

Accordingly, on the 30th day of October, 1902, the defendants Munn filed their answer (R., p. 8), together with a motion to discharge the restraining order (R., p. 16).

It thus appears from the record that though the defendants Munn were in foreign lands at the time of the issuance of the injunction, within fifteen days thereafter they voluntarily entered their appearance in the cause and diligently sought to procure its dissolution.

It cannot be seriously contended, under these circumstances, that because the order of injunction was not actually served upon Mrs. Munn, she, as the owner of the property and the only one damnified by the injunction, is not entitled to recover damages for the injury caused by its issuance.

A voluntary appearance is a waiver of notice by service of process, and actual notice of the injunction by Mrs. Munn made it binding upon her.

This court, speaking through Mr. Justice Brown, in *Re* Lennon, 166 U. S., 554, said:

"The facts that petitioner was not party to such suit, nor served with process of subpœna, nor had notice of the application made by the complainant for the mandatory injunction, nor was served by the officers of the court with such injunction, are immaterial, so long as it was made to appear that he had notice of the issuing of an injunction by the court. To render a person amenable to an injunction, it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice (High, Inj., sec. 1444; Mead *ex.* Norris, 21 Wis., 312; Wellesley *ex.* Mornington, 11 Beav., 181)."

In Ullman *ex.* Ritter, 72 Fed., 1000, it is said:

"The counsel for defendant seek to relieve him from the responsibility of his conduct in this respect, contending that knowledge thus acquired of the existence of the injunction had no legal and binding effect upon him. I cannot agree with them in their position, and I am unable to find, either

in the text-books or adjudicated cases, any authority to sustain such a position. If such a position could be maintained, it would destroy to a great extent the effect of the restraining powers of courts of equity, and their usefulness would be greatly impaired. I hold the unquestioned law to be that an injunction becomes operative from the time the order was made, and effective upon the party from the time he has notice of its existence. It is a matter of no moment how the defendant acquired the information of its existence. When once he has been apprised of the fact, he is legally bound to desist from doing what he is restrained and inhibited from doing. If this were not the rule, often great injury could be inflicted, in numberless cases, though the mandate of the court was in existence."

Edwards *vs.* Edwards, 31 Ills., 474:

"A defendant who obeys an injunction, though never served therewith, is entitled after judgment in his favor to claim the damages provided for in the undertaking given to procure such injunction.

"The only question is whether a defendant who obeys an injunction before the process is served, may have such relief. I think he may if he obeys the injunction. It has been held that it is the duty of the defendant to obey an injunction if he knows it has been granted, although it has not been served, and if he disobeys it, he would be liable to attachment. The injunction is granted before service of process often; and the undertaking when filed in such a case is for the benefit of the defendants, whether served or not, that are enjoined."

Blake *vs.* Nesbet, 144 Fed., 279, 282:

"It is a well-settled rule in equity that, to render a person amenable to an injunction, it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice thereof."

See also—

Oelrichs *vs.* Spain, 15 Wall., 211.
Andrews *vs.* Glenville Woolen Co., 50 N. Y., 282.
Cortelyou *vs.* Houghton, 27 App. D. C., 188.

## Measure of Damages.

By the injunction undertaking filed in the case, the complainant and his sureties undertook to make good to the defendants all damages suffered or sustained by reason of wrongfully and inequitably suing out the injunction (R., p. 7).

The result of the injunction was to deprive Mrs. Munn, the owner, of the use of her house for the entire "season" beginning in the fall of the year 1902.

The question then arises, What damage did Mrs. Munn suffer and what method of ascertainment thereof should be adopted?

The auditor held that the measure of damages "must be the value of the use of the property during the period from the first part of November to the following May."

He says:

"The claimant, Mrs. Munn, is entitled to the value of the use of the property during the season of deprivation, and the evidence (of rental values) is to be applied to that period not solely for the purpose of showing what she lost as rent or income, but to determine what it would have cost her to procure the use of other property approaching her own in location, condition, and equipment during such time" (R., p. 22).

We submit, this is the true rule respecting the measure of damage in this case, and that the only logical method of ascertaining the "value of the use" was adopted by the auditor, viz: the ascertainment of the rental value, from the testimony "of persons qualified by experience in the business of dealing with real estate of the character of the property in question, and conversant with its character and surroundings" (R., p. 22). At that time this house had always been the Washington home of Mr. and Mrs. Munn and their children and had never been leased to tenants. There was, therefore, no other method than that adopted by the auditor of determining the rental value of the property.

"Where a party is restrained by an injunction wrongfully sued out, from exercising acts of ownership over land, he will be entitled to such damages as are the necessary and proximate result of that deprivation. In determining their extent, the court proceeds upon equitable principles, and is not governed by arbitrary or technical rules."

16 Am. & Eng. Ene. Law, 2 ed., p. 466.

In Rutherford *vs.* Moore, 24 Ind., 311-312, it is said:

"The injunction restrained Moore from having a writ of possession executed, issued by the auditor of the State in his favor, against Moynes for lands sold at a sinking fund sale. The appellee had a right to recover for the use and occupation of land for the time he was kept out of the possession thereof by the wrongful proceedings of Moynes."

In Edwards *vs.* Edwards, *supra*, the plaintiff, by reason of an injunction, had been deprived of the use and enjoyment of a certain farm from March to September following. In discussing the question of the measure of damages the court says:

"The principal question, however, on the assessment of damages, is as to the use of the land. The injunction was issued early in the spring, and was dissolved in September, and during that time restrained the party from taking possession of a farm. The defendant insisted that the measure of damages was the value of the use of the land up to the time when the injunction was dissolved. We think the court properly allowed the evidence to take a wider range, and show that being kept out of the land till the 1st of September occasioned the loss of the crops for the season. The question is not, what the land was worth to the complainant in the injunction suit, but what was the damage to the defendant for being kept out of possession during that period."

Lange *vs.* Wagner, 52 Md., 310, was an action for damages on an injunction bond. Proof was offered that the plaintiff was engaged in supplying his customers with milk and kept a number of milch cows. His frame stable, having become somewhat out of repair, was partially torn down in the summer of 1877, and he began to erect a brick stable in its

place. He was stopped by an injunction in August, which was dissolved December 6.

*Held*, that "injury done to his cattle by exposure to the weather, requiring extra care and food and causing their flow of milk to greatly diminish," was a proper element of damage.

By the prayers which were granted, the jury were instructed that they might find for the plaintiff "in such damages, if any, as shall appear from the evidence that he actually and necessarily or directly sustained by reason of the writ of injunction" and "that actual, natural and proximate damages are such as are the direct, necessary and natural result and effect of the act complained of and from which injury is alleged to have been sustained."

In Wood *vs.* State, 66 Md., 61, it was held that—

"The true rule for estimating damages for wrongfully depriving a party of the use and possession of a portable sawmill for the period of six weeks is the rental value or hire of the sawmill, or one of similar capacity, for the like period."

And that:

"Equivalent words to 'rental value' or 'hire,' as applied to a sawmill, would be 'the value of the use of the sawmill.'"

Smith *vs.* Wells, 46 Miss., 61:

Smith brought an injunction suit against Wells, enjoining a proceeding of forcible entry and detainer instituted by her to recover the possession of a tract of land. The injunction was dismissed, and thereupon suit was entered against Smith and his sureties on the injunction bond.

The court say (p. 69):

"The premises, by means of the injunction, were withheld from Mrs. Wells for a year. It was in evidence that their use for the year was worth $500, which was the amount of damages awarded by the jury. * * * The

loss of the use and rental of the premises for a year was the result of suing out the writ; or, at all events, the jury have certified that damages to the extent of the value of one year's rent has ensued. But for the interference of the complainant, Mrs. Wells or her tenants would have occupied the premises, or she would have recovered possession, perhaps in time to have made them available. * * *

"The party injured by the injunction is entitled to compensation for all loss and injury, naturally and fairly referable to the wrongful act of the obligor."

The case of Roberts *vs.* White, 73 N. Y., 380,

is strikingly similar to the case at bar. This was a suit brought to restrain the tearing down of a party wall, afterwards proven to be built entirely on defendant's land. Subsequently the cause was referred to a referee to assess damages to which defendant was entitled under the injunction bond. In passing upon the question, the court say (p. 380):

"Upon the question of damages, and in respect to material facts, there was a conflict of evidence, but that material damages were sustained by the defendants, by reason of the injunction, which could not have been avoided, is proved by all the witnesses who spoke upon the subject. All agree that there was and would have been a necessary delay in the putting up and completing for occupation the defendants' buildings, and that the expenses would have been increased even had the defendants proceeded, as it is claimed they might have and ought to have done, and taken down all the old buildings except the disputed wall, and built up from the foundations to the timbers of the first or ground floor, while the injunction was in force.

"The witnesses for the plaintiff testified that by such a proceeding the cost of the building would have increased, and by the delay there would have been a loss of rent. But the referee had a right to, and evidently did, adopt the views and act upon the evidence of the defendants' witnesses, that, in the erection of permanent building in that location, it would not have been safe or prudent to proceed to lay the foundation of any part until they were prepared to lay the whole, and that it would or might have endangered the foundation and the walls already up to drive

piles, as would be necessary, to support the foundation on the line of the wall in contention, when that should have been taken down and removed. They were also of opinion that this removal of the other walls would have rendered the disputed wall unsafe. It suffices to say that the parties, while they should do nothing to enhance the damages, and should do all they reasonably could to diminish them, were *not bound to incur any hazard or assume unusual risks*, and are not responsible, if adopting such course as experienced and competent architects and builders regarded as prudent and proper, another course might, in the opinion of others equally experienced and skillful, have been adopted, which would have been equally safe and proper, and which would have reduced the damages, and to some extent relieved the plaintiff from the consequences of his own acts in procuring an injunction without right. The defendants were only bound in good faith to do that which those skilled in building would think reasonably necessary to save the plaintiff from unnecessary loss. If the evidence preponderated greatly on the side of the plaintiff upon this question; if the evidence on the part of the defendants were such as to show that they acted in good faith, and proceeded, as they thought they safely could, having respect to the location and character of the building to be erected and the foundation to be placed, in tearing down the old building and proceeding with the new, pending the injunction, they would not be liable for not proceeding more rapidly."

* * * * * * *

"But, as before suggested, they were not called upon to take risks in the matter, and are not to be held rigidly and absolutely to the adoption of that course, which would certainly save the plaintiff loss."

The items of damage awarded were (1) loss of rent of the building; (2) increased cost of labor and material; (3) counsel fees on motion to dissolve injunction and appeal from the order of dissolution, aggregating $5,731.12, exclusive of interest for more than ten years, which was all lost, as the penalty of the bond was but $5,000.

Counsel for appellant relies upon the decision of this court in the case of *The Conqueror*, 166 U. S., 110, in support of his contention that "rental value" is not the measure

of damage in this case. He overlooks the fact that the auditor did not hold that to be the measure of damage. To the contrary, as before shown, he held the measure of damage to be the value of the use of the property during the period of deprivation and evidence of rental value was considered in determining the value of the use.

The Court of Appeals so clearly points out the differences between that case and the case at bar, we content ourselves with quoting from the opinion of the court by Mr. Justice Robb. He says:

"That case was a libel to recover possession of the steam yacht *Conqueror*, which had been illegally detained by the collector of customs for the district of New York, and for damages for the illegal detention. It appears that the vessel *was designed* for pleasure only, and had never been put to any other use. The court said: 'The main question in this case turns upon the proper measure of damages. In the amount of $21,742.24, awarded by the final decree of the district court, was included the sum of $15,000 for loss of use of boat while detained by the respondent, from August 27, 1891, to February 3, 1892, at $100 per day. This is the principal item of damage to which objection is made in this court.' After directing attention to the fact that damages caused by an illegal seizure of a ship are in the nature of demurrage, and that, therefore, there must be actual loss in order to warrant a recovery, the court further said: 'The difficulty is in determining when the vessel has lost profits, and the amount thereof. The best evidence of damage suffered by detention is the sum for which vessels of the same size and class can be chartered in the market. Obviously, however, this criterion cannot be often applied, as it is only in the larger ports that there can be said to be a market price for the use of vessels, particularly if there be any peculiarity in their construction which limits their employment to a single purpose. In the absence of such market value, the value of her use to her owner in the business in which she was engaged at the time of the collision is a proper basis for estimating damages for detention, and the books of the owner showing her earnings about the time of her collision are competent evidence of her probable earnings during the time of her detention. * * * Again, the

court may properly take judicial notice of the fact that the yachting season in our northern waters practically comes to an end before the first of November, and as *The Conqueror* was seized on August 27, during more than one-half the time for which demurrage was allowed, she probably would have been laid up at her wharf. It is true, there was a possibility that her owner might have desired her for use in a winter's cruise to tropical waters; but there was not the slightest evidence of that, and the contingency of her being so used was too remote to justify an allowance upon that basis.'

"We think there is a clear distinction between the case of *The Conqueror* and the case at bar. *The Conqueror* was a pleasure yacht only, and there was no evidence that her owner intended to use her during the period she was held by the collector. Moreover, she had been seized by an officer of the United States in the line of his duty, and, although it subsequently transpired that he had acted under a misapprehension of the law, the circumstances of the case demanded that clear, positive, and certain proof of actual loss be adduced to entitle her owner to recover damages for her detention.

"In the present case we are dealing with a dwelling-house and the home of the injured party. The testimony not only shows the value of the use of similar homes, but it shows that Mrs. Munn would have occupied and received benefit from her home, but for the injunction wrongfully procured by appellant."

## The Injunction Undertaking Should Be Liberally Construed for the Protection of the Appellee.

It is seriously contended by counsel for the appellants that inasmuch as there were four defendants named in the injunction order, and the undertaking undertook to make good to the *defendant* only all damages suffered or sustained, Mrs. Munn is not entitled to its protection, because it is impossible to tell what defendant was referred to in the undertaking.

In other words, the contention is that because the appellant at the time he gave the undertaking, in order to secure the injunction, failed, or purposely neglected to add the letter

"s" to the word "defendant" in the undertaking, only one defendant is protected thereby, and which one it is impossible to determine.

This contention should receive no consideration, especially in a court of equity.

In the case of Fulton *vs.* Fletcher, 12 App. D. C., 1, which was an action for damages on an appeal bond, the court say **(p. 17):**

"The very wide range and varying character of actions, suits, judgments, and decrees necessitated broad generalization in the stipulated conditions of a form of bond intended to operate at all. The very nature and uses of such bonds and their general recitals, in necessary conformity to the terms of statutes or rules of court, render it unreasonable and unjust to give the liability of sureties therein the strictness of interpretation that sometimes applies in the case of guarantors or special sureties in voluntary contracts between two parties. *The interpretation, on the contrary, should rather be liberal, for the necessary protection of those who have nothing to do with the form or approval of the obligation, and are compelled, against their wills, to forego their legal claims and incur risk of loss by reason thereof.*"

This rule, we submit, applies with equal, if not greater, force to an injunction undertaking.

## The Injunction Undertaking Should Be Rigidly Enforced in This Case.

It is contended by counsel for appellants that the court in the exercise of its sound discretion, should relieve against liability on the injunction undertaking herein in accordance with the principles laid down by this court in Russell *vs.* Farley, 105 U. S., 433.

The facts of this case do not present any grounds for the application of the doctrine of that case.

The appellant Hutchins was the next-door neighbor of the appellee. He knew that she was building an addition to her house. He claimed that such action was in violation of his

rights. He did nothing, however, to prevent the continuance of the project until Mrs. Munn had left the country and was in foreign lands, and the work upon the addition had progressed to the point where the foundations were laid and the walls of the main house torn out, rendering it uninhabitable. He then filed his bill for an injunction, claiming that the building of this structure would deprive him of the light and air which he had enjoyed for years; that it was in violation of a verbal agreement had between him and a former owner of the Munn property, and that it was in violation of the building regulations of the District.

The trial court ruled against him on each and all of his contentions and dissolved the injunction. From this judgment he appealed to the Court of Appeals, which court affirmed the decision of the court below (22 App. D. C., 88).

He knew when he obtained the injunction that he would delay the completion of the work and deprive Mrs. Munn of the use of her home. He knew, or must be presumed to have known, that damages would thereby result.

The work was undertaken in the summer season with a view of completing it before winter set in. By reason of the injunction the work was stopped on the 14th of August and could not be resumed until November 25 following, when the injunction was dissolved. The result of this was that all of the good weather within which to do the work was lost and it had to be done in the cold of winter, with consequent delays and interruptions due to the conditions of the weather.

In conclusion, we submit that the decree of the court below should be affirmed. Appellant sued out the injunction while his neighbors were in Europe, as he very well knew. He also knew that the injunction could not be dissolved until Mr. and Mrs. Munn had answered the bill. This could not be accomplished without tedious and protracted correspondence, unless one or the other returned to this country. Mr. Munn came for no other purpose than to try

as best he could to get the injunction out of the way of the building operations. But before the motion to discharge could be heard and disposed of, the good weather of the autumn months was gone. Thereafter the work of building could not be carried on with any great degree of regularity, but only as weather conditions permitted.

The auditor has found the following fact, which cannot now be controverted:

"The progress of the work on this addition at the date of the restraining order was such as to render the house for dwelling purposes practically uninhabitable."

Wherefore the Munns lost the use of their house during that season. The value of the use so lost was ascertained and determined by the auditor as a finding of fact, and this finding has been approved by the special term and the Court of Appeals. Under the rules laid down in this court, the finding must now "be taken as presumptively correct."

Respectfully submitted.

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